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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 494

L. B. NORTON, BETTIE, KIZZIE GOUGE, OKCHUMPULLA,
ET AL., APPELLANTS,

vs.

CHEPARNEY LARNEY, A MINOR, AND BENNIE GREEN,
HIS LEGAL GUARDIAN

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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CAPTION IN U. S. CIRCUIT COURT OF APPEALS

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1922, of said Court, before the Honorable William S. Kenyon, Circuit Judge, and the Honorable Wilbur F. Booth and the Honorable Tillman D. Johnson, District Judges.

Attest: E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. [Seal of United States Circuit Court of Appeals, Eighth Circuit.]

Be it Remembered that heretofore, to-wit: on the thirtieth day of August, A. D. 1922, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein L. B. Norton, et al., were Appellants, and Cheparney Larney, a minor, by Bennie Green, his legal guardian, was Appellee, which said transcript as prepared, printed and certified by the Clerk of said District Court in pursuance of an Act of Congress approved February 13, 1911, is in the words and figures following, to-wit:



IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE R. L. WILLIAMS, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

CHEPARNEY LARNEY, A MINOR, BY HIS LEGAL
GUARDIAN, BENNIE GREEN, PLAINTIFF,

In Equity

vs.

No. 2658.

L. B. NORTON, BIG JACK AND BETTIE, DEFENDANTS.

L. B. NORTON, BETTIE, KIZZIE GOUGE, OKCHUMPUL-
LA, SUCKCHO, SAM AND ALBERTA GOUGE, MINORS,
BY ERNEST GOUGE, THEIR LEGAL GUARDIAN, AND
NOGWEE, BY JIM HILL, HIS LEGAL GUARDIAN,

APPELLANTS,

vs.

CHEPARNEY LARNEY, A MINOR, BY BENNIE GREEN.
HIS LEGAL GUARDIAN, APPELLEES.

In the United States District Court in and for the Eastern
District of Oklahoma—Term of 19—

Cheparney Larney, a Minor, by His Legal Guardian, Bennie
Green, Plaintiff, vs. L. B. Norton, Big Jack and Bettie,
Defendants. No. 2658-Eq.

Bill of Complaint.

Cheparney Larney a citizen of the State of Oklahoma and
the Eastern District of Oklahoma residing in McIntosh Coun-

ty in said state, brings this bill against L. B. Norton a citizen of the State of Oklahoma residing in Okmulgee County, and Big Jack and Bettie citizens of the State of Oklahoma and residing in McIntosh County, Oklahoma, all residents of the Eastern District of Oklahoma;

And thereupon your petitioner complains and says; that he is a full-blood Indian and enrolled as such on the Creek Tribal Roll Number N. B. C. 1287; that he is a male infant under the age of twenty-one years and that Barney Green is his duly appointed and acting guardian, having been appointed as guardian by the County Court of McIntosh County, Oklahoma.

That said petitioner received as his distributive share of the lands of the Creek Nation as follows:

The East Half of the Northwest Quarter of Section Twenty-nine (29) and the Northeast Quarter of the Northeast Quarter and the Southwest Quarter of the Northeast Quarter of Section Thirty (30), Township Seventeen (17) North and Range Nine (9) East, in Creek County, Oklahoma. Containing 160 acres more or less according to the Government Survey thereof.

That he went into possession of the above described land by authority of the several treaties between the Creek Nation and the Government of the United States and the Laws of Congress that have been enacted dealing with the land and individuals of the Creek Nation, soon after said allotment was made and has been in open and notorious and peaceable possession of the same since the time of receiving his allotment patents from the Creek Nation up to the present time and is now in open, notorious and peaceable possession of the same.

Your complainant further states that Big Jack who was enrolled as a full-blood on the Creek Tribal Rolls, opposite Roll Number 8291, and Bettie who is enrolled as a full-blood on the Creek Tribal Rolls, opposite Roll Number 8292 claim that Cheparney Larney is their son and that he is dead, and they acting on such beliefs, executed a deed to the above described allotment of Cheparney Larney, and executed a petition asking for the approval of said deed, which said petition was filed in the County Court of McIntosh County and by reason thereof an order was obtained approving the said deed to L. B. Norton; that the said L. B. Norton filed said deed for record in the office of the County Clerk of Creek County, Oklahoma, against the above described land and allotment of this complainant Cheparney Larney.

Your complainant further states that Big Jack and Bettie above mentioned and described are not his father and mother but that his father is Jaccob Larney sometimes known as Jacob Tiger and is enrolled as a full-blood Creek Indian on the Creek Tribal Rolls, opposite Roll Number 7968 and that his mother is Bittie Larney sometimes known as Lucy Green and enrolled as a full-blood Creek Indian on the Creek Tribal Rolls, opposite Roll Number 8361.

To the end that your complainant may obtain the relief to which he is entitled in the premises he now prays the court to grant him due to process by subpoenas directed to the said L. B. Norton, Big Jack and Bettie, the defendants hereinbefore named, requiring and commanding each of them to appear herein and answer the several allegations in this, your complainant's bill contained.

Your complainant further prays that upon the final hearing, it be ordered and decreed that the land above described is the allotment of Cheparney Larney your complainant herein and that your complainant Cheparney Larney is the identical person entitled to said allotment and the identical person who was allotted on said above described land and who was enrolled on the Creek Tribal Rolls, opposite Roll Number N. B. C. 1287 as a full-blood Indian; and that the deed executed by Big Jack and Bettie, hereinbefore described, to L. B. Norton is null and void. And that the claim of said Big Jack and Bettie of any right, title or interest in and to the above described land be denied and that the deed above mentioned from Big Jack and Bettie to L. B. Norton be cancelled as a cloud upon the title of your complainant and that Big Jack and Bettie and L. B. Norton be forever barred and enjoined from asserting any claim, right, title or interest against this complainant in and to the above described land.

Complainant further prays for such other and further relief as may be just and equitable.

CLARK NICHOLS,
Attorney for Complainant.

Filed Jun. 2, 1920. W. V. McClure, Clerk.

Answer.

Come now the defendants, L. B. Norton, Big Jack and Bettie, and for their answer to the bill of complaint filed in this cause say:

They deny that Cheparney Larney, the plaintiff in this suit, is the Chaparney Larney enrolled as stated in the peti-

tion, but on the other hand state that Chaparney Larney, the son of the defendants, Big Jack and Bettie, is dead and that the defendants, Big Jack and Bettie, as the father and mother of the said Chaparney Larney, were at the time of the sale and deed as mentioned in the petition the legal owners of the premises as described in said petition.

They deny that the plaintiff in this case ever went into possession or ever had any possession whatever of the land sued for in this case and that if any possession was taken that the same was wrongfully and unlawfully obtained as against defendants, Big Jack and Bettie.

Defendants neither admit nor deny the enrollment of Big Jack and Bettie as to the numbers being correct as set out in the petition but state that said Big Jack and Bettie were duly enrolled upon the Creek Tribal Rolls, and admit that they executed the deed to L. B. Norton and that same was approved by the County Court of McIntosh County.

All other allegations in the bill of complaint not above specially admitted are here and now generally denied and as much so as if each specific allegation was set up and specifically denied.

HORNER & SWAN,
Attorneys for Defendants.

Filed Jun. 29, 1920. W. V. McClure, Clerk.

Order.

Pursuant to the application of the defendants herein to file an amended answer in this cause, it is ordered that said defendants be permitted to file their amended answer.

R. L. WILLIAMS, Judge.

Filed Jan. 7, 1922, as of Jan. 2, 1922. W. V. McClure, Clerk.

Amended Answer.

Come now the defendants, L. B. Norton, Big Jack and Bettie, and by permission of this court file this, their Amended Answer to plaintiff's Bill of Complaint.

Defendants deny that the plaintiff is the person who was enrolled by the Commission to the Five Civilized Tribes under the name of Cheparney Larney, and opposite N. B. C. (New Born Creek) Roll No. 1287; and deny that said plaintiff received as his distributive share of the Creek tribal

lands the allotment described in his petition, and further deny that he is entitled to possession of the same.

Defendants further deny that the plaintiff in this action is the Cheparney Larney described on New Born Creek Census Card No. 1010, with Roll No. 1287.

Defendants state that if plaintiff went into possession of said allotment and is now in possession of the same, he has held the same wrongfully from these defendants for the reason that said land allotted under said roll number to Cheparney Larney, was intended for and made to a deceased son of the defendants, Big Jack and Bettie, in pursuance of the Acts of Congress of March 3, 1905, and various other Congressional acts prior thereto, creating the Commission to the Five Civilized Tribes, and providing for the enrollment of the members thereof and the distribution of Creek lands thereto.

Defendants further state that said deceased child was born in the year 1904 and died about the month of November, 1906; that during the lifetime of said child, proceedings were commenced by the said Commission to the Five Civilized Tribes to have said child enrolled and much data and information was gathered and presented to the said Commission from time to time. That on February 23, 1907, said Commission, after considering all the data and information before collected and presented, prepared a written decision which described said Cheparney Larney as the son of Big Jack and Bettie, who are identified in said decision by their Creek roll numbers as they appear upon the final rolls of said Creek Tribe, to-wit: No. 8291 and No. 8292, respectively.

Defendants further state that all of said data, together with the written decision of the Commission to the Five Civilized Tribes, is now on file in the office of said Commission at Muskogee, Oklahoma.

Defendants admit the execution and approval of the deed by Big Jack and Bettie to L. B. Norton, referred to in plaintiff's complaint, and state that they, the said Big Jack and Bettie, were the owners of said land at the time and had a lawful right to convey the same.

Defendants pray for a decree of this court finding that Cheparney Larney was the son of the defendants, Big Jack and Bettie, and that upon his death they inherited the land described in plaintiff's complaint and allotted to him; and that the conveyance of the same to the defendant L. B. Norton, vested the said L. B. Norton with title thereto. And further pray that the defendant, L. B. Norton, be decreed to be the

owner of said land and entitled to possession thereof and that his title be forever quieted in him, and for costs.

G. R. HORNER,

Attorney for Defendants.

Filed in open court Jan. 2, 1922. W. V. McClure, Clerk.

Reply to Defendant's Amended Answer.

Come now the plaintiff, and for reply to the amended answer of defendants filed in this case says:

That he denies each and all of the material allegations set forth and alleged in defendant's amended answer.

REUBELT & NICHOLS,

Attorneys for Plaintiffs.

Filed in open court Jan. 3, 1922. W. V. McClure, Clerk.

Decree.

Now on this 3rd day of January, 1922, this cause came on to be heard in its regular order, the plaintiff being represented by Reubelt & Nichols, as his attorneys, and the defendants L. B. Norton, Big Jack and Bettie, by their attorney G. R. Horner; and the court having heard the evidence and argument of counsel and being fully advised in the premises, finds the issues in favor of the plaintiff, and against the defendants, and the court finds the facts generally in favor of the plaintiff; and the court finds; that Cheparney Larney, the plaintiff, is a full-blood Indian enrolled as such on the Creek Tribal rolls opposite Roll No. N. B. C. 1287; and that as such full-blood Indian he received as his distributive share of the lands of the Creek Nation or Tribe of Indians an allotment described in his petition, to-wit:

The East Half of the Northwest Quarter of Section Twenty-nine (29), and the Northeast Quarter of the Northeast Quarter, and the Southwest Quarter of the Northeast Quarter of Section Thirty (30), Township Seventeen (17) North, Range Nine (9) East, situate in Creek County, State of Oklahoma, containing One hundred Sixty (160) acres, more or less, according to the Government survey thereof.

And the court finds; that the said Cheparney Larney, the plaintiff, is the legal owner in possession of the said land and that his title thereto is valid and perfect and superior to any

right or interest claimed by the defendants, and that defendants, or either of them, have no right, title nor interest in and to the said premises. To all of which findings defendants except.

It is therefore, ordered, adjudged, and decreed by the court; that the title and possession of said plaintiff, in the said premises be, and the same is hereby forever settled and quieted in the plaintiff, as against all claims or demands by the said defendants, or either of them, and those claiming, or to claim under them or any of them:

That the deed executed by Big Jack and Bettie to L. B. Norton, which was approved by the County Court of McIntosh County, and recorded in Book——at Page——in the office of the County Clerk of Creek County, Oklahoma, and all other deeds and documents in said chain of title claimed by defendants, be and the same are hereby cancelled and removed as clouds on the title of the said plaintiff, Cheparney Larney, in and to the said described premises.

And it is further ordered, decreed and adjudged that said defendants, L. B. Norton, Big Jack and Bettie, and those claiming through, by or under them or any of them be, and they are hereby perpetually enjoined and forbidden to claim any right, title, interest, or estate in and to said premises by virtue of said deed, hostile or adverse to the possession and title of plaintiff herein; and that said defendants, L. B. Norton, Big Jack and Bettie, and those claiming under them or any of them, are hereby perpetually forbidden and enjoined from beginning any suit to disturb the said plaintiff in his said possession and title to said premises, from setting up any claim or interest adverse to the title of plaintiff herein; and from disturbing plaintiff in his peaceable and quiet enjoyment of said described premises. And it is further, decreed that plaintiff have and recover his costs from defendants. To which order and decree [] except.

R. L. WILLIAMS, Judge.

O. K.—Reubelt & Nichols.

Filed in open court Jul. 1, 1922, as of Jan. 3, 1922. W. V. McClure, Clerk.

Motion of Heirs of Big Jack to Be Substituted as Parties Defendant.

Come now Suckcho, Sam and Alberta Gouge, minors by Ernest Gouge, their legal guardian, Bettie, Okchumpulla,

Kizzie Gouge, and Nogowee, or Nokomis Jackson, a minor, by Jim Hill, his legal guardian, and respectfully show to the court that heretofore, to-wit, on the 12th day of March, 1922, the defendant in this cause, Big Jack, died, intestate, in the Eastern District of Oklahoma; that said Big Jack left no will, and no administrator or other personal representative has been appointed for his estate; that these movants are the legal heirs of said Big Jack, and they pray this cause as to the said Big Jack be revived, and that they be substituted as parties defendant in his place and stead in order that they may perfect their appeal from the decree heretofore rendered in this cause against the said Big Jack.

G. R. HORNER,
GIBSON & HULL,
Solicitors for Movants.

United States of America,
State of Oklahoma, County of Muskogee.—ss.

Personally appeared before me, the undersigned, an officer authorized by law to administer oaths, Ernest Gouge, of lawful age, who being first duly sworn, on oath states: That he has read the foregoing motion and is familiar with the facts therein stated, and that said facts are true.

EARNEST GOUGE.

Subscribed and sworn to before me this 30th day of June, 1922. Mayme Hightower, Notary Public. My commission expires June 2, 1924. (Seal)

Filed in open court Jul. 1, 1922. W. V. McClure, Clerk.

Order.

Now on this 1st day of July, A. D. 1922, this cause comes on to be heard upon the application of the heirs at law of the defendant, Big Jack, suggesting his death of record, and praying that they be substituted as parties defendant herein, and that said cause be revived, and the court being duly advised in the premises finds that reasonable notice of said application has been given to the solicitor of record for the plaintiffs herein, and that Big Jack, a defendant against whom final decree herein was rendered, died on March 12, 1922, intestate, and that no executor, administrator, or other personal representative of his estate has been appointed.

It, is therefore, ordered and adjudged that said cause be revived as to the said Big Jack, and that the heirs of said Big Jack, to-wit, Bettie, Kizzie Gouge, Okchumpulla, and Sam

Gouge, and Suckcho and Alberta Gouge, minors, and their legal guardian Ernest Gouge, and Nogowee, or Nokomis Jackson, a minor, and his legal guardian, Jim Hill, be substituted as parties defendant in the place of said defendant, Big Jack.

R. L. WILLIAMS. Judge,

O. K.—Reubelt & Nichols.

Filed in open court Jul. 1, 1922. W. V. McClure, Clerk.

Statement of the Evidence.

Be it remembered, that on the 3rd day of January, 1922. this cause coming on for hearing at Muskogee, Oklahoma, before the Honorable R. L. Williams, United States Judge. and the plaintiff being represented by Mr. Horace Rheubelt and Mr. Clark Nichols of Eufaula, Oklahoma, and the defendants being represented by Messrs. Horner & Swan of Okmulgee, Oklahoma, and counsel for the plaintiff and the defendants announcing to the court that they were ready to proceed with the trial of this cause, the following proceedings were had, to-wit:

Whereupon, Mr. Jasper Bell, was duly sworn according to law to act as interpreter.

Whereupon, CHEPARNEY LARNEY, being duly sworn according to law, was called to the witness chair and was examined by the aid of the interpreter and testified as follows, to-wit: My name is Cheparney Larney. I live near Hannah. Don't know just exactly how long I have lived there. For over twenty years. I am 19 years old; will be twenty on my next birthday. My father's name was Jacob Larney. My mother's name is Petey Larney. Bennie Green is my guardian. He is my grandfather. I remember my father.

The Court: When was the enrollment made?

Mr. Nichols: Last order made February 23, 1907.

The Court: What does the record show the allottee's age was?

Mr. Nichols: Shows the allottee was one year old in 1905.

Mr. Horner: We will just agree the record may be introduced at this time.

Thereupon plaintiff offers Exhibit No. 1, to which no objection was offered, with the exception of the notation made on the census card which defendants say is not a part of the enrollment record, as follows: "See affidavit of Jacob Jacob

and Bennie Green showing that Lucy Green, No. 8361 is the mother of number 1, and not Bettie at number 8292—some initials."

Mr. Nichols: We don't care about the initials.

The Court: Very well, that part is excluded.

I know a man in my neighborhood by the name of Big Jack. I know a woman by the name of Bettie. Bettie and Big Jack are husband and wife. They live about a mile from my house. My father, Jacob Larney, and my mother, Bettie Larney, lived about a mile from Big Jack. I know Okchumpulla, Big Jack's child.

Cross Examination.

I don't know when my next birthday is going to be. I am going to be 19. My father's name was Jacob Tiger, and my mother's name besides Petey was Lucy Tiger. My name is Articee. I went to school at Bacone College a few years ago, and went by the name of Artis Tiger. Near my house is a small school house, and Okchumpulla and I went to school there. I went by the name of Artis Tiger there. My parents and grandfather called me Cheparney when I was a little boy. I don't know when they commenced to call me Articee. I have one younger brother and a sister. My brother's name is Joe Tiger. We are both sons of Jacob Tiger. My mother is Bennie Green's daughter, and her name is Lucy Green.

Whereupon, JASPER BELL, the interpreter, was examined, and testified as follows: The word Cheparney translated into English means Little Boy. Larney means yellow or green. Kalarney means yellow-head. It doesn't mean anything like Cheparney.

Whereupon, BEN GREEN, a witness on behalf of the plaintiff, being first duly sworn according to law, was examined, and testified as follows: My name is Ben Green. I was enrolled under the name of Henaha Fixico. I guess I am 57 years old, but am not sure. I was raised in and around Hannah neighborhood and have lived there a long time. I knew a man in that neighborhood by the name of Jacob Larney or Jacob Tiger. I knew a woman there by the name of Petey or Petey Larney. She was my daughter. Jacob Larney was her husband. They had three children born to them. Their names were Chebon Larney, Joe Larney and one died in infancy without name. Joe Larney and Cheparney are now living. I am guardian for both of them. As such guardian I

have leased Cheparney Larney's lands for agricultural and oil purposes. Plaintiff's exhibits 2 and 3 are, one is a deed for 120 acres and the other is on the homestead. It is Cheparney Larney's land. The first time I saw them Jacob Larney, father of Cheparney Larney, received them and turned them over to me. Jacob Larney died going on four years ago. I knew an Indian named Alex Posey. I saw him in my neighborhood about the time Cheparney Larney was about a year old. At that time I was a member of a group of Indians opposed to the work of the Dawes Commission who were trying to allot the land. I did not see Alex Posey at Jacob Larney's home, but he told me that he came by; came and stopped and went by. I know an Indian by the name of Bry or Jacky Thlocco, and his wife, whose name is Betty. I never heard of her having any other name. I have known Big Jack forty years. The Indians called him Jakey Thlocco. (The interpreter, Jasper Bell, in answer to a question says that the Creek word "Thlocco" means large or big). On account of his size the Indians called him Jakey Thlocco, and white people called him Big Jack. (It was conceded that this Indian was enrolled as Big Jack, his roll number being 8291, about 1899. It was not conceded that he was never enrolled as Jacob Larney, defendants' solicitor stating he didn't know what the proof would show.) Jacob Larney lived about not quite a mile from Big Jack. Big Jack and Bettie lived about a mile from Jacob Larney and Petey Larney, and both raised families in the same neighborhood. Jacob Larney died about 1916. He didn't know just how many years had passed since the first time he heard that Big Jack made some claim to the allotment of Cheparney Larney, but Jacob Tiger told him that Big Jack had told him that Cheparney was not his boy; that his boy was named Okseetka. (It is conceded that the wife of Jacob Larney was enrolled as Lucy Green, is on the land now as Lucy Green, and is identified as the daughter of Bennie Green; and the wife of Big Jack is enrolled as Bettie, her roll number being 8292. It is further admitted that Bennie Green, as guardian of Cheparney Larney, appeared in the County Court of McIntosh County at the time of the purchase of this land from Big Jack and Bettie by L. B. Norton, and put on testimony to show that this was the plaintiff's land and that plaintiff was not dead.)

Cross Examination.

The word "Cheparney" might apply to any little boy among the Creek people. Before they gave them any name they might call them that. (It is admitted that the plaintiff has two names, the one given him by the Department at the time of the enrollment, and the other name given him by his

grandfather when starting him to school, to-wit, Artisee Tiger.) Big Jack and Bettie had three children; one named Okchumpulla; the smallest one was named Okseetka, the next one they called it by two names, one was Okchumpulla and the others called him Larney or Cheparney. They called him Kalarney, and now they call him Cheparney. He is alive and his name is Okchumpulla. Okchumpulla and Kalarney is one and the same boy. (It is admitted that Big Jack was the father of Nicey and Lucinda and Tecumseh and Kizzie). Witness has three children living. Their names are Peetie Larney, Jeanetta Green, Siah Green. Peetie is the one enrolled as Lucy Green. He doesn't know her roll number. Alex Posey came out in that neighborhood and went to the various houses to find these children, but he doesn't know whether he went to Big Jack's house or not. He knows Okchumpulla. Big Jack's boy younger than Okchumpulla, was two or three years younger. He did not talk very plain and was about two feet high.

Redirect.

Big Jack had three boys. The oldest one was named Tecumseh; the next one Okchumpulla, and the next one Okseetka. Witness has been a very close neighbor of Big Jack and Bettie's for the last 40 years. Lived not quite a mile apart. He knew no other boys which they had except the three named. Tecumseh and Okseetka is dead. Tecumseh lived to be a man and married and had children. Cheparney Larney, witness' grandson, was older than Okseetka. He guesses about five years, but would not be certain. Okseetka had just commenced to walk when he died.

Cross Examination.

He didn't know who informed him that Big Jack was claiming this land, but Jacob Tiger told him that Big Jack told him Cheparney Larney was not my boy and the deed was turned over to me. That was before witness was appointed guardian for this boy and while Jacob Tiger was alive. It has been quite awhile ago.

J. H. HILL, witness on behalf of the plaintiff, being first duly sworn testified as follows: My name is Jim Hill. Am a full-blood Creek Indian, enrolled as such. Live at Eufaula. Lived close to Eufaula before the town of Hannah was built. Have been in that neighborhood since I was a young man. Was a member of council for Hillabee Canadian Town in 1900. Was Town King. Bettie, wife of Big Jack, belonged to Hillabee Canadian, and so did Big Jack. Jacob Larney belonged to Tulledegee Town. Witness knew both Big Jack

and Jacob Larney and knew them a long time. Knew the family of Big Jack. He only knew two of his boys: Tecumseh and Okchumpulla. He did not know the other boy, but heard he had a boy by the name of Okseetka. Peetey was the name of the mother of the plaintiff. She was the wife of Jacob Larney. William Barnett was Town King at the time Lucy Green was enrolled. When I became Town King I received from the Department the allotment certificate for Lucy Green. I had a big bunch of allotment certificates, Big Jack's folks and others and Lucy Green's, and altogether I got a big bunch of those papers. I made inquiry about who Lucy Green was and talked with William Barnett about it. He said she was Bennie Green's daughter. And I delivered the allotment certificate to this woman Peetey Larney. William Barnett said he had enrolled her as Lucy Green. I have known plaintiff a long time and the name Cheparney Larney is all I have known him by.

Cross Examination.

I heard him called Articee Tiger in the trial at Eufaula. I don't know whether he went to school at Bacone College and the district school down there under that name. Someone told me that Big Jack and Bettie had a younger child than Okchumpulla. It was Tom Red who told me. He said they don't remember the child's name very well, but thought it was Okseetka, and said they called it Cheparney, Cheparney Larney. That this child was also called Cheparney Larney. Tom Red told me that I think in 1906, in the summer. He is in the hall here. He was not a council member. I got him to help me enroll that day. And he told me in 1906 Big Jack and Bettie had a child younger than Okchumpulla and that was Okseetka. I had nothing to do with this young boy, Cheparney Larney, whoever he is. I know about Alex Posey being down in that country looking up the newborn Indians. I never helped any on that.

Redirect.

Alex Posey called me several times up to Eufaula and I came and helped him put some of the young people on the roll.

JOSEPH PIGEON, witness on behalf of the plaintiff, being duly sworn, testified as follows: My name is Joseph Pigeon. I am thirty years old. I live seven miles from Hannah. Have lived in and around Hannah 29 years. I know the family of Big Jack and Bettie. I know Bennie Green. I know Cheparney Larney and Okchumpulla. Okchumpulla is Big Jack's son. Cheparney Larney is Peetey Larney's son and

Bennie Green's grandchild. I know Tecumseh, he is Big Jack's son, Big Jack had another boy besides Okchumpulla and Tecumseh, whose name was Okseetka. He had no other boys. Okseetka has been dead a long time. I knew Cheparney Larney when he was a little boy and knew Oskeetka at the same time. Okseetka was about a foot and a half or two feet high when he died. He was not strong enough to walk and he could not talk plain. At that time Cheparney Larney was about five years old. I belong to Okchiye Town.

Cross Examination.

When this boy I know, Cheparney Larney, was small he was known as Articee Tiger. The boys who played with him called him that. He was small when he was called Cheparney Larney. I am thirty years old. When this boy went to school down in the country they called him Artis Tiger. I never heard Okseetka called any other name. I never knew of his being called Kalarney Cheparney. The father of this boy whom I call Cheparney Larney was Jacob Larney. I knew Jacob Larney in his lifetime.

Plaintiff then offered in evidence plaintiff's Exhibits 4, 5, and 6.

Whereupon LUCY GREEN, a witness on behalf of the plaintiff, being first duly sworn, testified as follows: My white folks name is Lucy, and my given name is Peetey. I don't know how old I am. My father's name is Bennie Green. and is also named Henaha Fixico. My husband's name is Jacob Tiger. He was known as Jacob Larney. I am sometimes known as Peetey Larney. I have three children, two living and one dead. The two living are named Joe Kalarney and Cheparney Larney. Cheparney Larney was the boy who testified here awhile ago. Jacob was the father of these two. Jacob and I were living at my father's house when this boy Cheparney Larney was born. That was near Hannah. Near a mile, but I don't know just how far from the place where Big Jack and Bettie lived. I don't know that I know all of the boys that were born to Bettie and Big Jack, but I know some that were living and some that died. I know three boys that they had. Their names were Tecumseh, Okchumpulla and Okseetka. They might have had some more boys, but I don't know anything about them. I have lived within a mile of Big Jack and Bettie all of my life. Jacob Larney tried to have my children enrolled. I never made any effort to get myself enrolled.

Cross Examination.

Someone came to the house; I don't know what his name was, but they told me he was the man that enrolled the children. My oldest boy's name is Cheparney Larney. My other boy's name is Joe Tiger. They have the same father. I explain why one was called Joe Tiger and the other Cheparney Larney because the Commissioners give the name of Cheparney Larney. He had not been called Cheparney Larney before the Commissioner gave him the name. Cheparney was all he was called. Before he was enrolled he was called Articee and Cheparney. I don't think he was known as Articee Tiger before he was enrolled. That is the name now. I don't know when he got it. It has been quite awhile. He was sometimes called that before enrollment, and also Cheparney. Cheparney means little boy, or little boy Tiger. I would call any little boy that until he was given a name. My name is Lucy Green, sometimes called Peetey. I have never been called Bettie.

Whereupon plaintiff offers in evidence exhibits 4, 5 and 6, and also plaintiff's exhibits 2 and 3, to which there was no objections. Plaintiff also offered in evidence plaintiff's exhibit 7; admitted without objection. Plaintiff thereupon offered in evidence plaintiff's exhibits 8, 9, 10 and 11, to which the defendant objected for the reason that they are instruments purporting to appoint a guardian for Cheparney Larney and the petition and order making an oil and gas lease on the said land and the oil and gas lease itself, for the reason they are transactions taken place since the completion of the enrollment records and are not competent evidence in this action and would not serve to determine the identity. Whereupon it was admitted that the plaintiff was in possession of the land at the time that suit was brought and still is in possession, though defendants claim they are in the unlawful possession. Thereupon the exhibits 8, 9, 10 and 11 were withdrawn. Thereupon plaintiffs offered in evidence plaintiff's exhibit 12, which was admitted without objection, except that the consideration of the exhibit was objected to unless it was proven that the letter was actually received by the party whom plaintiff claimed to be the father of Cheparney Larney.

The Court: This is the record. Of course it is only a record to show what was done by the Commission, but there is no evidence to show that Bettie, wife of Big Jack, received it, and it will not be considered for that purpose. The court will rule that it does not have that effect.

Thereafter plaintiff offered in evidence plaintiff's ex-

hibits 13, 14, 15 and 16, which were admitted without objection. Thereupon plaintiff rested.

Whereupon THOMAS RED, a witness upon behalf of defendants, being first duly sworn, testified as follows: I am called Thomas Red. I live three miles east of Hannah. I am well acquainted with Big Jack and his wife, Bettie. I got acquainted with them a little before the Civil War. I now live about two miles from them and lived at the same place at the time of enrollment. Big Jack lived at the same place. I know their children. They had three boys. The oldest one is called Chedock Hooker. The English name is Tecumseh Jackson. The next boy we call Okchumawn. That is the same as Okchumpulla. The next boy's name they call Cheparney Larney. I don't know whether he had any other. The Indians keep no records and I can't say just as to the time when he was born. He is now dead. He may have been called Kalarney, but all the name I ever heard of was Cheparney Larney. Cheparney means little boy. Kalarney means his head is yellow or green. It means a yellow-headed boy. The hair of this boy was light; kind of yellow. J. M. Hill and myself enrolled some of the children in the Hannah neighborhood. The Ernest children, the children of Ernest Gouch. He was a son-in-law to Big Jack. I saw this little boy of Big Jack's and Bettie's. I know Alex Posey. He was working in that neighborhood for the Dawes Commission in enrolling. I did not see him at Big Jack's house. This boy of Big Jack's called Cheparney was living at the time Alex Posey was in that neighborhood. He died as nearly as I can estimate it, in the year 1906. I know Jacob Tiger's wife. Her name was Peetey. I don't know of any other name for her.

Cross Examination.

Soon after the close of the Civil War I was brought back to the Hannah neighborhood and have been there ever since. I have lived within two miles of Big Jack since the Civil War and now I am living a mile and three-quarters. I said he had three boys. The oldest named Tecumseh, the next named Okchumpulla, and the next a little boy called Kalarney or Cheparney Larney. I never heard the name Okseetka. I am sure Big Jack and Bettie never had but three boys. I know Jacob Larney for over thirty years. I don't know about how long ago it was he died. It might be about four or five years, but I have no record. His wife's name was Peetey. I never called her Peetey Larney, but she was the wife of Jacob Larney and was called Peetey Larney. Big Jack's wife was never called anything to my knowledge except Bettie. Jacob Larney was

known in that community also as Jacob Tiger. When he was a pretty good size boy I got acquainted with him and the people were then calling him just Jacob.

Redirect.

I am not related to Big Jack or Bettie.

Thereupon GEORGE SIMMONS, a witness called by defendants, was first duly sworn, and testified as follows: My name is George Simmons. I live near Hannah. I know the defendants Big Jack and Bettie. Have known them for 26 years. I live six miles from them. I know their children. They had three boys. There was one Tecumseh, the one they call Timmy; and one is called Okchumpulla; and the third child is called Kalarney, Cheparney Larney. Cheparney Larney was about four years old. I saw him in 1904 and also in 1905, and at that time the boy was wearing a dress. I don't know exactly when he died, but it was between 1906 and 1907. He was a somewhat yellow-head. Okchumpulla was yellow-headed when he was small, but he grew out of it. I knew Jacob Tiger, and knew two of their children. One called Articee and the other Joe. Articee is the same boy who appeared here as a witness in this case. I lived in the neighborhood of Jacob Tiger and his family during his lifetime, within about six miles. I did not visit his place. The only name I ever heard for this boy was Articee. I never heard him called Cheparney Larney. Jacob's wife was named Pee-ty. That is the only name I know for her.

Cross Examination.

I said Big Jack and Bettie had three boys, the oldest one name Tecumseh and the middle one Okchumpulla. The smaller one was called Cheparney Larney. When children are small and the hair is light or yellow they call them according to the looks of the head up until they get older, and when they get older the hair looks different and at that time the color of the hair is the name they give them. That is the only reason I know that is the name he went by. Big Jack was never called Larney. I have known Bettie, his wife, to be known as Bettie Larnogee. I never heard that the youngest boy of Big Jack's was called Okseetka.

Whereupon CUTSEE HARJO, a witness for defendant, being first duly sworn, testified as follows: My name is Cutsee Harjo. I know the defendants Big Jack and Bettie. Have known them since the close of the Civil War. I live near

them. I know their children. They had three boys. Their names were Sadock Hoka, the English name for that being Tecumseh. Okchumpulla and Cheparney Larney. The last one was the youngest. He lived two or three years. He was living at the time of the final enrollment of the children of the Creeks. I know Alex Posey. Saw him in that neighborhood enrolling minors and newborn children. I don't think he went to the house of Big Jack and Bettie. He had something to do with the enrollment of the children of Big Jack and Bettie.

Cross Examination.

I knew William Barnett in his lifetime. He was King or Chief of Hillabee Canadian Town. I remember Alex Posey coming down and going to William Barnett's house and asking him about the children to be enrolled in that town. I heard the interview when Alex Posey was questioning William Barnett. At that particular time I did not hear this particular conversation when William Barnett told him there was two children of Big Jack and Bettie, one named Okchumpulla and one named Okseetka, but since this question arose I heard it. There was some conversation concerning the question of Bettie and Big Jack's children between Alex Posey and William Barnett, but I did not pay any attention to it. I was with Eufaula Harjo, and we just gathered around out of idle curiosity to see what this man was doing. I suppose William Barnett was the only one that gave any testimony to Alex Posey at that time. I don't know how long after that this little boy of Big Jack's died. I have known Jacob Larney a long time, and am well acquainted with him. Peetey was his wife.

Whereupon BIG JACK, one of the defendants, being first duly sworn, testified as follows: My name is Jackey Thlocco, but I hear that—it must be the white folks word—they call me Big Jack. I have been called that about 70 years. Bettie is my wife. I have had several boys, but all are dead except three; I mean I have only one boy living. His name is Okchumpulla. I had a boy younger than Okchumpulla. I don't know how much younger, but he was up pretty good size and could talk very plain. His name was Cheparney Larney. That was my way of calling him, and all the neighborhood knew him by that name. The old Indians called my wife Bettie Larney. My wife was called Bettie Larney after I married her ever since she was so high. I heard of Alex Posey being in the neighborhood to see about enrolling the small children. He never came to my place. I heard he was in the neighborhood trying to get the names of the small children

and some of the parents would not turn the name of the children in and he had to confer with the neighbors who might know. I did not turn the name of my children in. I did not have them enrolled. I suppose that some of the neighbors tell them the names and turn the names of the children in and by that the names appear on the different rolls.

Cross Examination.

I don't know myself but I was told my wife Bettie's father's name was Columbochee. I never saw him. I was only told that before she was born he was killed and after she was born her mother died while she was an infant. Her father was never in the Hannah neighborhood. I knew William Barnett. He was one time Town King. I don't know whether he told Alex Posey about my children and tried to get them enrolled. When Alex Posey was in that country trying to find these newborn Creeks I had three boys. They were Tecumseh, Okchumpulla and a little boy. I never knew of that little yellow-headed boy being called Okseetka. I don't know how much older Okchumpulla was than the little boy. Cheparney Larney was the youngest, and Okchumpulla is older than Cheparney Larney and also called Kalarney. I know Jacob Larney and his wife and have lived neighbors to them a long time.

Whereupon BETTIE, being duly sworn, on oath testified as follows: My name is Bettie. I am the wife of Big Jack. When I was a girl I was called Bettie Larney. My father and my mother died before I knew them. Thomas Red's grandmother took me when I was small. I had one boy younger than Okchumpulla. He is dead. I think he was at least three years of age when he died, because he could talk very plain and could ask a white man for a chew of tobacco. His hair was yellow and his face was yellow. I don't know how old Okchumpulla was when this little boy was born because people keep the record of different ages but I did not. Okchumpulla had learned to walk and talk when Cheparney was born. I was told about Alex Posey being in the neighborhood to enroll the children, but I did not remember about him being to our house. The little boy was alive at that time. I don't know how old I am. I was carried away on a horse on the breaking out of the Civil War.

Cross Examination.

I know Jasper Bell, an interpreter. It is a fact that the first time I ever knew I had a claim to this land was in 1920 when Jasper Bell came to my house and talked to me about it.

I then signed some papers with Big Jack and then went to the County Court and sold the land for \$1600.00.

Redirect.

I don't know the time when I first heard that Cheparney Larney was enrolled, but James Hill came to my house and told me that you have two boys on the roll and they got allotments. One of them is dead now. You could go ahead and lease this land and get some money out of it and help yourself with it. But we did not give any attention to that until this interpreter came and told us that this boy had received this allotment and the litigation started. It was several years ago that James Hill told me this. I knew he was enrolled before Jasper Bell came to my house, but I did not know where his land was until Jasper Bell told me.

BIG JACK, recalled, testified as follows: I was not at home when James Hill came to the old lady and told her you had two boys and they both got allotments, and one is dead, and you have been told that you cannot lease or rent this land, but that is not true; you can go ahead and rent it or lease it for oil purposes and get some benefit out of it. That was quite awhile ago. I don't know. Not very long after allotment.

The Court: The question of the validity of the judgment of the Dawes Commission is not involved. The question before this court is whether the plaintiff who sues through his guardian in this case and who has been known by the name of Cheparney Larney is the identical person who was enrolled by the Commission to the Five Civilized Tribes as the son of Jacob Larney, Roll number—and of Peetie Larney, roll number—as contended on the part of plaintiff.

The records shows that Big Jack is enrolled under the Creek Dawes Roll number 8291 and Bettie, wife of Big Jack, appears opposite the Dawes Roll number 8292. The question here presented is as to an ambiguity in the record. The entire record of the enrollment comes up for the consideration of the court, not only the certificate of the enrollment but the record including the application and the evidence. That is the way I understand the law. Now application is made on April 24, 1905, by Alex Posey who presented to the Commission a list of children for whom application could not be made theretofore and he made the application as follows: "the child of Jacob Larney (or Green), Arbeka Tulledega Town, Bettie Larney (or Green), Hillabee Town." Now Jacob Larney who is enrolled as Jacob Tiger was from Arbeka Tulledega Town

Plaintiff's Exhibit No. 1.

References

Post Office Alameda, 25.

NEW BORN
Nation,

Act of Congress Approved March 3rd, 1905 (Public No. 212)

Card No. **1019**

[illegible]

For Father's enrollment see

Roll Card No. 3044

For Mother's enrollment see

Roll Card No. 3044

Remarks Application for enrollment of NCI received April 24-1905
Name of person upon on final roll No. 8291 as Big Rock
Name of mother " " No 8291 " 13 mile
July 23, 1907- Division meeting NCI organized by Commissioner
Book issued May 4-1907

Mich. 31, 1930
 George Affolons of Hinderfries or Bermin
 is now showing that Paul Bremer 1831 is
 the mother of Nell and not Bette as of 1892.
 1932

Enrollment of No. 1289 Approved _____

By Secretary of Interior Mar 4 1907

Approved Feb 21 1907

Date Jun 20 1905

Combinatorics



and Lucy Green, I believe that is her name, being the name by which she is enrolled being also known as Bettie Green and as Peetie Larney appears to be the mother of the plaintiff, Cheparney Larney. Now Big Jack was not from Arbeka Tulled-ega Town. I believe from this evidence that this child, Okseet-ka, is the child that the defendants' witnesses referred to. I can't believe the defendants' witnesses who testified that Big Jack had a child a year or two or three years old and that prior to enrollment, prior to the time Alex Posey went down in that community he was called Cheparney Larney. This record undisputably shows that the Commission to the Five Civilized Tribes gave him that name and it is unreasonable evidence when it shows that prior to that time he was called in that community by the name that the Dawes Commission afterwards arbitrarily gave him. Now these old Indians, I don't find they committed perjury. This has been a long time and my experience as a lawyer tells me about matters remote that the recollection of witnesses is easily and erroneously refreshed sometimes as to remote matters. So I find generally in favor of plaintiff and a decree will be entered by this court removing the cloud from the title.

Plaintiff's Exhibit No. 1.

[See insert for Creek New Born Census Card No. 1010.]

Copy.

Department of the Interior,
Commission to the Five Civilized Tribes.

April 24, 1905.

In the matter of the application for the enrollment of certain new borns as citizens of the Creek Nation.

Alex Posey, being duly sworn, testified as follows:

By Commission:

Q. What is your name, age and post office address?

A. Alex Posey, 31, Muskogee.

Q. Are you a citizen of the Creek Nation? A. Yes, sir.

Q. Got your land, have you? A. Yes, sir.

Q. You have been engaged recently in the field for the Dawes Commission securing evidence about Creek citizens or new borns? A. Yes, sir.

Q. Have you a list of children for whom application could not be made and about whom you have succeeded in obtaining some information? A. Yes, sir.

Q. You may state the conditions and the names of these children? You desire to make application for them?

A. Yes, sir.

Q. Name them.

A. Jaly Proctor, Weogufky Tom, Sukey Proctor, Weogufky Tom, have two children—one about three years old and one about six months old. Post office, Hanna, Indian Territory.

Jacob Bullet, about three years old, Parents; Maxey Bullet, Seminole, and Hannah Bullet; Hillabee. Post office, Hanna, Indian Territory.

Connie Hawkins, Hillabee Town, Sabella Hawkins, Okchiye, have two children—one about three years old and a younger child. Post office, Hanna, Indian Territory.

Willie Fisher, Hickory Ground Town, Lussee Fisher, Okfusky Canadian Town, have two children—one about three years old and a baby. Post office, Slumker, Indian Territory.

Lizzie Lasley, about three years old, Sam Lasley, born in either August or September, 1904. Parents: Sam Lasley, Okchiye, Wisey Lasley Weogufky town. Post office, Hanna, Indian Territory.

Jim Haynes (or Sangee), Okchiye Town, Folothokee, Weogufky Town, have a male child about three years old named Joe. Post office, Hanna, Indian Territory.

Taylor Foley, Weogufky, Melina Foley, Okchiye, have a child about two years old. Post office, Slumker, Indian Territory.

Phillip Lindsey, Tuchabatchee, Cilla Lindsey, Hillabee, have a child about three years old. Post office, Hanna, Indian Territory.

Big William (or William Thlocco), Okchiye Town, Cinda Williams, Weogufky Town, have two children—one about three years old—one born in February 1905. Post office, Hanna, Indian Territory.

Freeland Lindsey, Tuckabatchee or Hillabee, Nancy Proctor, Tullahassoche, have a child about two years old. Post office, Hanna, Indian Territory.

Timonthluppy George, Weogufky Town, Nellie George, Pukon Tullahassee, have a child about three years old. Post office Slumker, Indian Territory.

Walter Simmons, Weogufky, Chippie Simmons, Pukon Tullahassee, have a child about one year old. Post office, Hanna, Indian Territory.

Jacob Larney (or Green), Arbeka Tulledega Town, Bettie Larney, (or Green), Hillabee Town, *have a child*. Post office, Hanna, Indian Territory.

John Hill, Okchiye, Millie Hill, Weogufky, have a child about three months old. Post office, Hanna, Indian Territory.

Jim Pigeon, Okchiye Town, Jennie Pigeon, Okchiye Town, have a child about five months old. Post office, Hanna, Indian Territory.

Thomas Deo, Okchiye, Nancy Deo, Fish Pond Town, have a child about three months old. Post office, Hanna, Indian Territory.

Jack Buckner, born December 17, 1904. Parents: Wiley Buckner, Okchiye, Susie Buckner, Cussehta. Post office, Hanna, Indian Territory.

Q. This is the information you received from relatives right around there on April 24, 1905? A. Yes, sir.

Q. Were you informed that the parents of these children were unwilling to make application for their enrollment?

A. Yes, sir.

Q. This was the only way that the rights of these children would be saved?

A. Yes, sir. I made every effort to obtain direct information from the parents but in every instance they refused to give their testimony.

Lona Merrick, being duly sworn, states that the above and foregoing is a true and correct transcript of her stenographic notes as taken in said cause on said date.

(Signed) Lona Merrick

Subscribed and sworn to before me this 9th day of May, 1905. (Seal) (Signed) Edw. C. Griesel, Notary Public.

I, Lona Merrick, solemnly swear that I copied the above testimony from the original, on the 18th day of July, 1905, and that the same is a true copy.

Lona Merrick.

Subscribed and sworn to before me this 18th day of July, 1905. (Seal) Edw. C. Griesel, Notary Public.

Department of the Interior,
Commissioner to the Five Civilized Tribes.

Muskogee, Indian Territory.

February 16, 1907.

In the matter of the application for the enrollment of Cheparney Larney, as a citizen by blood of the Creek Nation.

Alex Posey, being duly sworn, by O. C. Hinkle, a Notary Public, testified as follows.

Examination by Commissioner:

Q. What is your name, age and post office address?

A. Alex Posey, age 33, Muskogee.

Q. Did you on July 19, 1905, go to the home of Jacob and Bettie Larney, for the purpose of obtaining information with reference to a child of theirs? A. Yes, sir.

Q. Did you see that child? A. Yes, sir.

Q. Was that child a boy or girl?

A. I am under the impression he was a boy.

Q. What is your best opinion with reference to the age of that child?

A. The child appeared at that time to be about a year old.

Q. The parents of that child refused to give any information concerning that child?

A. They wouldn't give any information whatever.

Q. Do you know whether they are members of the Snake or disaffected faction of Creeks?

A. The father of the child's mother very much opposed the work of this Commission.

Q. Do you know if the child is now living?

A. I made inquiries about this child a short time ago and I am informed that the child is still living.

Lona Merrick, being duly sworn, states that the above and foregoing is true and correct transcript of her stenographic notes as taken in said cause on said date.

Lona Merrick,

Subscribed and sworn to before me this 18th day of February, 1907, Oliver C. Hinkle. Notary Public.

Department of the Interior,

Commissioner to the Five Civilized Tribes.

Cr. 2448-B Muskogee, Indian Territory, July 19, 1905.

Commissioner to the Five Civilized Tribes,
Muskogee, Indian Territory.

Sir: In the matter of the application for the enrollment of an unnamed child of Jacob and Bettie Larney (2448-B), as a citizen by blood of the Creek Nation, I have the honor to report that the parents of said child refuse to execute affidavits or to testify in the case; nor can any evidence be secured from relatives and neighbors about said child. Said child appears to be about a year old, but I am unable to ascertain its name or sex.

Respectfully,

(Signed) Alex Posey,

Clerk in Charge Field Party.

NC 1010

OCH CM.

Department of the Interior,
Commissioner to the Five Civilized Tribes.

In the matter of the application for the enrollment of
Cheparney Larney as a citizen by blood of the Creek Nation.

Decision.

It appears from the records of this office that on April 24, 1905, testimony was offered "In the matter of the application for the enrollment of certain new borns, as citizens of the Creek Nation" which embraced a child of Jacob Larney (or Green) and Bettie Larney (or Green), which is herein considered as an original application for the enrollment of said person as a citizen by blood of the Creek Nation. Further proceedings were had February 16, 1907.

It appears from the testimony that about July 19, 1905, a Creek field party went to the home of said child for the purpose of obtaining information with reference to the right to enrollment of said child, and that the parents refused to give such information because of the influence over them of the Snake or disaffected faction of the Creeks: that the clerk in charge is under the impression that said child is a male but states that he could not learn the name of said child. In view of the fact that the full name of said child could not be ascertained, and that it is believed that said child is a male, reference to said person will hereinafter be made under the name of Cheparney Larney, the Creek word "Cheparney" signifying "little boy."

The evidence and the records of this office show that said Cheparney Larney is the child of Jacob Larney and Bettie Larney, whose names appear as "Big Jack" and "Bettie" on a schedule of citizens by blood of the Creek Nation, approved by the Secretary of the Interior March 28, 1902, opposite Nos. 8291 and 8292 respectively.

The evidence shows that about July 19, 1905, said Cheparney Larney appeared to be about one year old.

Although the evidence herein is not as full and complete as has heretofore been required by this office to establish the right of a person to be enrolled as a citizen of the Creek Nation, in view of the provisions of the Act of Congress approved April 26, 1906, (34 Stat. L. 137), fixing March 4, 1907, as the date after which the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person as a citizen of said Nation, it is believed that the evidence herein

should be considered sufficient to establish the facts necessary to enrollment.

It is, therefore, ordered and adjudged that said Cheparney Larney is entitled to be enrolled as a citizen by blood of the Creek Nation, under the provisions of the Act of Congress approved March 3, 1905, (33 Stat. L. 1048), and the application for his enrollment as such is accordingly granted.

Tams Bixey, Commissioner.

Muskogee, Indian Territory, Feb. 23, 1907.

Blank 731.

Creek Roll, Citizens by Blood.

New Born.

Act of Congress Approved March 3rd, 1905. (Public No. 212.)

Number	Name.	Age.	Sex.	Blood.	Card No.
1287	Larney, Cheparney	1	M	Full	1010

Blank 734

Department of the Interior.

United States Indian Service

Five Civilized Tribes.

Muskogee, Oklahoma.

This is to certify that I am the officer having the custody of the records pertaining to the enrollment of the member of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of Indians, and the disposition of the lands of said tribes, and that the following papers, attached hereto, are true and correct copies of that portion of the enrollment record on file in the office in connection with the application of Larney Cheparney Roll No. 1287, for enrollment as a New Born Citizen of the Creek Nation, so far as same relates to the age of said citizen.

Creek New Born Census Card No. 1010; Testimony dated April 24, 1905, and Feb. 16, 1907; Letter dated July 19, 1905; Decision dated Feb. 23, 1907, and Approved Roll as to No. 1287.

(Seal)

Gabe E. Parker,

Superintendent for the Five Civilized Tribes.

Dec. 22, 1920. HJH

Plaintiff's Exhibit 2.

Homestead deed. (39A) New Born Indian roll No. 1287.

The Muskogee (Creek) Nation,
(Formerly Indian Territory)
Oklahoma.

To all to whom these presents shall come, greeting:

Whereas, by the Act of Congress approved March 1, 1901, (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Cheparney Larney a citizen of said tribe, as a homestead,

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Cheparney Larney all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz: The North East Quarter of the North East Quarter of Section Thirty (30), Township Seventeen (17) North and Range Nine (9) East of the Indian Base and Meridian, in Oklahoma, containing forty (40) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to the provisions of said Act of Congress relating to the use, devise and descent of said land after the death of the said Cheparney Larney; and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 10th day of December, A. D. 1908.

(Seal) Moty Tiger.

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior. Approved Mar. 25, 1909.
Richard A. Ballinger, Secretary. By Oliver A. Phelps, Clerk.

Filed for record on the 30 say of Mar., 1909, at 3 o'clock P. M.

Department of the Interior.

Office of the Superintendent for the Five Civilized Tribes,
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records of deeds of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations, and the above and foregoing is a true and correct copy of the deed issued to Cheparney Larney as the same appears of record in book HBK 34, page 115, of Creek deed records. Victor M. Locke, Jr., Superintendent. By P. L. Snyder, Clerk in charge Creek deed records. Date Aug., 12, 1922.

Plaintiff's Exhibit 3.

Allotment deed. (40A) New Born Indian roll No. 1287
The Muskogee (Creek) Nation,
Formerly Indian Territory)
Oklahoma.

To all to whom these presents shall come, greeting:

Whereas, by the Act of Congress approved March 1, 1901, (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of Cheparney Larney a citizen of said tribe, as an allotment, exclusive of a forty-acre homestead,

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Cheparney Larney all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz: The Southwest Quarter of the Northeast Quarter of Section Thirty (30), and the East half of the Northwest Quarter of Section Twenty-nine (29), Township Seventeen (17) North, Range Nine (9) East, of the Indian Base and Meridian, in Oklahoma, containing One hundred and twenty (120) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902, (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 10th day of December, A. D. 1908.

(Seal) Moty Tiger.

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior, Approved Mar. 25, 1909.
Richard A. Ballinger, Secretary. By Oliver A. Phelps, Clerk.

Filed for record on the 30 day of Mar., 1909, at 3 o'clock P. M.

Department of the Interior,
Office of the Superintendent for the Five Civilized Tribes.
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records of deeds of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations, and the above and foregoing is a true and correct copy of the deed issued to Cheparney Larney, as the same appears of record in book ABK. 34 page 115 of Creek deed records. Victor M. Locke, Jr., Superintendent. By P. L. Snyder, clerk in charge of Creek deed records. Date Aug. 12, 1922.

(Plaintiff's Exhibit 4.)

Department of the Interior,
Commissioner to the Five Civilized Tribes.
Hanna, Indian Territory. July 9, 1906.

In the matter of the application for the enrollment of citizens of the Creek Nation, of minor children born to duly enrolled citizens members of the so called Snake Faction.

William Barnett, being duly sworn, testified as follows: through Alex Posey, official interpreter.

Q. What is your name? A. William Barnett.

Q. What is your age? A. Forty seven.

Q. Are you a citizen of the Creek Nation? A. Yes, sir.

Q. To what Creek Indian town do you belong?

A. Hillabee.

Q. Do you know of any minor children in your town or neighborhood for whose enrollment application has not been made?

A. Jack Gouge has a child over a year old nicknamed Chunna; the child is a girl; I don't know her real name.

Q. What is the name of the mother?

A. Lucinda, she belongs to Hillabee Town.

Q. Is she enrolled as Lucinda Gouge?

A. I think so but I am not sure.

Q. Who are her parents?

A. Jackie Thlocco and Betty, simply Betty; both of Hillabee town.

Q. To what town does the child's father belong?

A. Hickory Ground.

Q. Is he known by any other name? A. I don't know.

Q. Have you any other children not enrolled? A. No, sir.

Q. What is the post office address of the parents?

A. Hanna.

Jack Gouge is identified opposite Creek Indian Roll No. 8498.

Earnest Gouge and his wife, Nicey, have four children probably not enrolled; their names are Pewter, Sam, Suckcho, and Casawka; I don't know their ages.

Q. To what Creek town does the mother belong?

A. Hillabee.

Q. What is your post-office address? A. Hanna.

Earnest Gouge is identified opposite Creek Indian roll No. 8497.

Nora Hall of Hillabee town has a child about a year old. The father of the child is an unknown white man; I don't know the sex of the child nor its name.

Q. Who are Nora Hall's parents?

A. Joe Hall and Jennie Bender; Joe belongs to Ketchopataka and Jennie to Hillabee town.

Q. What is Nora Hall's post office address?

A. Melette.

Nora Hall is identified opposite Creek Indian roll No. 8369.

Bettie Jack or Thlocco and Jackey Thlocco, both of Hillabee town, have two children. The oldest is named Okchumpulla and the other Okseetka, both children are boys and are living. [Clerk's Note: Notation "N. B. 476" on margin opposite this paragraph.]

Q. What is the post office address of the parents?

A. Hanna.

Chaellar Proctor and his wife, Sikey have two children. I don't know their names, ages or sex. The parents both belong to Weogufke; their post office address is Hanna.

Chaellar Proctor is identified opposite Creek Indian roll No. 7868.

I think I have given you all the information I have concerning the Snake children in this vicinity.

I, Alex Posey, being duly sworn, state that the above and foregoing is a true and correct transcript of my notes as taken in said cause on said date.

(Signed) Alex Posey.

Subscribed and sworn to before me this 31 day of July, 1906. (Seal) (Signed) Edward Merrick. Notary Public.

Lona Merrick, being duly sworn, states that she copied the above and foregoing and that the same is a true and correct [] of the original testimony.

(Signed) Lona Merrick.

Subscribed and sworn to before me this 6th day of August 1906. (Seal) (Signed) Edward Merrick. Notary Public.

NBC 476

WSC JCL

Department of the Interior,
Commissioner to the Five Civilized Tribes.

In the matter of the application for the enrollment of Okchunpulla as a citizen by blood of the Creek Nation.

Decision.

The record in this case shows that on July 9, 1906, the testimony of William Barnett was taken by a Creek enroll-

ment field party from this office, "in the matter of the application for the enrollment, as citizens of the Creek Nation, of minor children born to duly enrolled citizens, members of the so-called Snake faction," and that in said proceeding the said William Barnett testified relative to Okchunpulla, a child of Jackey Thlocco and Bettie Jack or Thlocco. Said action is considered as an original application for the enrollment of said Okchunpulla as a citizen by blood of the Creek Nation, under the provisions of the Act of Congress approved April 26, 1906, (34 Stats. 137). The said Jackey Thlocco and Bettie Jack or Thlocco are identified as the same persons whose names appear on a partial schedule of citizens by blood of the Creek Nation approved by the Secretary of the Interior, March 28, 1902, opposite numbers 8291 and 8292, respectively.

The evidence shows that at the time of the original and only proceeding had herein, the said Jackey Thlocco and Bettie Jack or Thlocco had two male children living, named Okchunpulla and Okseetka, of which Okchunpulla was the oldest. Such being the case, Okchunpulla must have been born prior to March 4, 1906.

It is, therefore, ordered and adjudged that the said Okchunpulla is entitled to be enrolled as a citizen by blood of the Creek Nation, under the provisions of the Act of Congress approved April 26, 1906, (34 Stats. 137) and the application for his enrollment as such is accordingly granted.

(Signed) Tams Bixby,
Commissioner.

Muskogee, Indian Territory. Feb. 19, 1907.

Department of the Interior.
Office of the Superintendent for the Five Civilized Tribes,
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes and that the above and foregoing is a true and correct copy of Testimony dated July 9, 1906, in re the application for enrollment as a Minor Citizen of the Creek Nation, of Okchunpulla, Minor Creek Roll No. 477, also Decision as to same dated Feb. 19, 1907.

(Seal)

Joe H. Strain,

Acting Superintendent for the Five Civilized Tribes.

Dec. 23, 1920. HJH

Plaintiff's Exhibit 5.

NBC 476

WSC JCL

Department of the Interior,
Commissioner to the Five Civilized Tribes.

In the matter of the application for the enrollment of
Okseetka as a citizen by blood of the Creek Nation.

Statement and Order.

The record in this case shows that on July 9, 1906, the testimony of William Barnett was taken by a Creek enrollment field party from this office, "in the matter of the application for the enrollment, as citizens of the Creek Nation, of minor children born to duly enrolled citizens, members of the so-called Snake faction," and that in said proceeding, the said William Barnett testified relative to Okseetka, a child of Jackey Thlocco and Bettie Jack or Thlocco. Said action is considered as an original application for the enrollment of said child as a citizen by blood of the Creek Nation, under the provisions of the Act of Congress approved April 26, 1906. (34 Stats. 137).

The said Jackey Thlocco and Bettie Jack or Thlocco, are identified as the same persons whose names appear on a partial schedule of citizens by blood of the Creek Nation approved by the Secretary of the Interior March 28, 1902, opposite numbers 8291 and 8292.

The evidence shows that at the time of the original and only proceeding had herein, the said Jackey Thlocco and Bettie Jack or Thlocco had a male child named Okseetka, but there is nothing whatever to show when said child was born, whether prior to or subsequent to the 4th day of March, 1906, although diligent efforts have been made by this office, through field parties to obtain such information.

In view of the foregoing, I am of the opinion that there is no authority of law for the enrollment of said Okseetka, as a citizen by blood of the Creek Nation and the application for his enrollment as such is accordingly dismissed.

Tams Bixby, Commissioner.

Muskogee, Indian Territory. Feb. 19, 1907.

Department of the Interior
Office of Superintendent for the Five Civilized Tribes,
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of

the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said Tribes and that the above and foregoing is a true and correct copy of Statement and Order dated Sept. 19, 1907, dismissing application for enrollment as Minor Citizen of the Creek Nation, of Okseetka.

(Seal)

Joe H. Strain,

Acting Superintendent for the Five Civilized Tribes.

Dec. 23, 1920. HJH

Plaintiff's Exhibit No. 6.

[See insert for Minor Creek Census Card No. 476.]

Plaintiff's Exhibit No. 7.

Department of the Interior,
Commissioner to the Five Civilized Tribes.
Muskogee, Oklahoma, March 19, 1910.

In the matter of the enrollment of Cheparney Larney as a New Born Creek Citizen, who is enrolled opposite approved Roll number 1287.

Examination conducted on behalf of the Commissioner to the Five Civilized Tribes, by W. H. Angell.

Jacob Larney, being first duly sworn by George A. Lowell, notary public, testified, through Jesse McDermott, interpreter, as follows:

Q. What is your name?

A. I have two names; Jacob Larney and Jacob Tiger.

Q. Under what name are you enrolled? A. Jacob Tiger.

Q. How old are you?

A. I do not know; I was a young man at the opening of the Civil War.

Q. What is your post office address? A. Hanna.

Q. Under what name are you generally known in the vicinity in which you reside?

A. I am generally known as Jacob Larney, although some know me by the name of Jacob Tiger.

Q. What is the name of your father?

A. Cotecha Homatka, which means Tiger.

Q. How did you acquire the name of Larney?

A. I am unable to tell you just why they named me that, but it is more of a nick-name given me when a small boy.

Q. Have you any other children besides Cheparney Larney? A. I have a small one.

Rollbook Shuck Nation **NEW BORN** Shuck Nation Shuck Roll Card No. 476
 Front Office Manana and Son Act of Congress Approved April 24, 1916

Roll No.	Name	Age March 4, 1916	Sex	Blood	Name of Father	Father's Roll No.	Name of Mother	Mother's Roll No.	Birth
477	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
478	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
479	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
480	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
481	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
482	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
483	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
484	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
485	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
486	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
487	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
488	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
489	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916
490	Okshenpalla	1	M	Yell	Big Jack	8291	Big M	8292	Prior to Mar 4, 1916

For Father's enrollment see Indian Roll Card No. 2867
 For Mother's enrollment see Indian Roll Card No. 2867

Remarks: Application received for Nov 1 & 2 July 9, 1906
Relay 19 1907 Division established Nov 1 signed by Commissioner
Relay 2 & 3 in the division for Division not paid

Roll issued Nov 29-1907

Enrollment of No. 477 Approved July 22 1907 Date Aug 14 1906
 By Secretary of Interior Mar 2, 1907



Department of the Interior,
Office of
Superintendent for the Five Civilized Tribes,
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes and that the above and foregoing is a true and correct copy of Minor Creek Census Card No. 476.

(Seal)

Joe H. Strain,
Acting Superintendent for the Five Civilized Tribes.

Dec. 23, 1920. HJH

Q. What is the name of that child? A. Joe.

Q. Any other name? A. Joe Tiger.

Q. When was Cheparney Larney born?

A. He is now about six years old.

Q. Has he got any other name?

A. No; there have been a number of names given him but we never called him by either of those names.

Q. Is he living? A. Yes, sir.

Q. Does he live with you? A. Yes, sir.

Q. Did Alex Posey appear at your house in April, 1905, to ascertain whether or not you had any children that were entitled to enrollment? A. Yes, sir.

Q. Did you tell him that you had a child that ought to be enrolled at that time? A. Yes, sir.

Q. Did you tell him who the mother of that child was?

A. Yes, sir.

Q. Who did you tell him was the mother of that child?

A. I did not tell him the name of the mother, because she was present herself and Mr. Posey knew her.

Q. What is the name of the mother of the child?

A. Peetie.

Q. Under what other name is she known? A. None.

Q. Who is Lucy Green?

A. I am unable to tell you who Lucy Green is just now.

Q. Under what name is your wife, Peetie, enrolled?

A. She ought to be enrolled under the name of Peetie.

Q. Have you received allotment certificates and patents covering the land allotted to her?

A. No, not yet. I understand that her land is located near the town of Paden.

Q. Has your wife any brothers and sisters living?

A. Jennetta, Siah and George Hutkey or White.

Q. What are the English names of your wife's father and mother?

A. Bennie is the name of the father. I do not know her mother's name.

Q. Did your wife go by the name of Green?

A. Yes, sir, if she was called according to my Indian name, she would be called Green.

Q. What is your Indian name?

A. Jacob Larney is my boy name.

Q. What is the word for Green in the Creek language?

A. Larney.

Q. Was your wife ever known by the name of Lucy Green?

A. I never did hear any body call her by that name, but it seems from the records here that she is enrolled as Lucy Green.

Q. How old is she? A. About thirty years old.

Q. Do you know Big Jack? A. Yes, sir.

Q. Has he got a wife by the name of Bettie? A. Yes, sir.

It appears from the records of this office that one Cheparney Larney is enrolled as a New Born Creek citizen opposite No. 1287; that the names of the parents are given as Jacob Larney and Bettie Larney and that they were identified on the approved roll as Big Jack and Bettie, respectively.

Q. Have you any reason to believe that this identification is incorrect?

A. To my knowledge Big Jack and his wife have never had a child by the name of Cheparney.

Q. Have they any male children under ten years of age?

A. They lost a male child about two years ago; they have one living at the present time and his name is Okchunpulla.

Q. Cheparney means little boy, in Creek, does it not?

A. Yes, sir.

Q. Do you know whether or not Alex Posey went to the house of Big Jack to see whether or not he had any children to enroll in 1905? A. No, sir, I do not.

Q. Was Big Jack ever known by the name of Larney?

A. No.

Q. Is Peetie the only wife you ever had? A. Yes, sir.

Q. And Cheparney is your only child?

A. Excepting the one that I have now.

Q. Did you ever execute an affidavit relative to the birth of Cheparney Larney?

A. No, I did not. I was talking to him on the train about the child at another time and he told me that it would not be necessary for me to make an affidavit of any kind about the enrollment of the child.

Q. How long was that after he appeared at your house on April 24, 1905? A. I don't remember.

Q. Did he tell you that Cheparney Larney had already been enrolled at the time he saw you on the train?

A. No, he told me that he was going to have him enrolled himself.

Q. Did you ever receive a notice from the Commissioner to the Five Civilized Tribes to appear at the Creek Land office and select land for Cheparney Larney? A. Yes, sir.

Q. Did you ever come here to file for Cheparney?

A. No.

Q. Were you ever notified that the Commissioner had made an arbitrary allotment to Cheparney? A. Yes, sir.

Q. Did you ever receive allotment certificates covering the land allotted to Cheparney?

A. No; that is why I came in to make inquiry about the child's land.

Q. Has your wife a Creek name?

A. No, the only name that she has is Peetie.

Q. What town does she belong to?

A. Hillabee Canadian.

Mattie P. Shanafelt, being first duly sworn, states that as stenographer to the Commissioner to the Five Civilized Tribes, she reported the proceedings had in the above entitled cause, and that the above and foregoing is a true and correct transcript of her stenographic notes taken on said date in said cause.

Mattie P. Shanafelt.

Subscribed and sworn to before me this March 24', 1910.
(Seal) Edward Merrick, Notary Public.

Department of the Interior,
Office of Superintendent for the Five Civilized Tribes
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes and that the above and foregoing is a true and correct copy of testimony dated March 19, 1910, in re the application for enrollment as a New Born Citizen of the Creek Nation, of Cheparney Larney, Creek New Born Roll No 1287.

(Seal)

Gabe E. Parker,

Superintendent for the Five Civilized Tribes.

Dec. 22, 1920. HJH

Plaintiff's Exhibit No. 12.

NBC 1010

Muskogee, Indian Territory,
March 18, 1907.

Bettie Larney, % Jacob Larney,
Hanna, Indian Territory.

Dear Madam: You are hereby advised that the Secretary of the Interior under date of March 4, 1907, approved the enrollment of your minor child, Cheparney Larney, as a citizen by blood of the Creek Nation, and that the name of said child appears upon the roll of new born citizens by blood, enrolled under the Act of Congress approved March 3, 1905, as number 1287.

This child is now entitled to allotment, and application

therefor should be made without delay at the Creek Land Office, Muskogee, Indian Territory.

Respectfully,

Department of the Interior,
Office of Superintendent for the Five Civilized Tribes,
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes and that the above and foregoing is a true and correct copy of Letter dated March 18, 1907, in re the enrollment as a New Born Citizen of the Creek Nation, of Cheparney Larney, Creek New Born Roll No. 1287.

(Seal)

Gabe E. Parker,

Superintendent for the Five Civilized Tribes.

Dec. 22, 1920. HJH

Plaintiff's Exhibit No. 13.

[See insert for Creek Census Card No. 2867.]

Plaintiff's Exhibit No. 14.

[See insert for Creek Census Card No. 2901.]

Plaintiff's Exhibit No. 15.

[See insert for Creek Census Card No. 2733.]

Plaintiff's Exhibit No. 16.

[See insert for Certificate of Arbitrary Allotment to Cheparney Larney.]

Plaintiff's Exhibit No. 13.

Residence:

Page 055: *Of the same, and later.*

Enoch

NATION

Canals

Roll

Card No. 8867

Field No. 5044

Page No. 101	NAME	MALE	AGE	REL.	BLOOD	TYPE	TRIAL REGISTRATION	TRIAL ENROLLMENT OF PATIENTS
1	8391 Bugack		60 M	Self			1098, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424, 1425, 1426, 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Department of the Interior,
Office of
Superintendent for the Five Civilized Tribes,
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes and that the above and foregoing is a true and correct copy of Creek Census Card No. 2867.

(Seal)

Gabe E. Parker,
Superintendent for the Five Civilized Tribes.

Dec. 22, 1920. HJH

Department of the Interior,
Office of
Superintendent for the Five Civilized Tribes,
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes and that the above and foregoing is a true and correct copy of Creek Census Card No. 2901.

(Seal)

Gabe E. Parker,
Superintendent for the Five Civilized Tribes.

Dec. 22, 1920. H.JH

Plaintiff's Exhibit No. 15.

Residence: *Princeton*

No 2 Hanna

Bruck NATION

Kendall ROLL

Card No. 2783

FILED 28/8

Post Office: US Army and the

Boonville and Ten

Draft and No.	NAME	Born Date	AGE	SEX	RACE	TOTAL ENROLLMENT	TOTAL ENROLLMENT OF FATHERS
		Month	Year			No.	Name of Father
7967	Gill, Oscar	50 M. Full	1893	Indi	Wagoner	And Wagoner	Melvin
7968	Liver, Jacob	Age 45 M.	1895	"	84	Texas	And Oklahoma
7969	Edell, Marie	Age 43 Y	1895	"	35	And	
7970	Juanar	Age 24 Y	1895	"	36	Ariz	And Arizona
	CITIZENSHIP CERTIFICATE ISSUED FOR No. 3 JAN 27, 1902						
	CITIZENSHIP CERTIFICATE ISSUED FOR No. 4 DEC 31, 1901						
	CITIZENSHIP CERTIFICATE ISSUED FOR No. 5 OCT 19, 1901						
	CITIZENSHIP CERTIFICATE ISSUED FOR No. 6 APR 27, 1904						

ENROLLMENT.

NO. 7967-7970 are persons
enrolled in the Territory
between March 21, 1902

5/18/15 affidavit filed states that they
were not the sons of No. 1
D.C.H.

DATE OF APPLICATION
FOR ENROLLMENT
May 23, 1901

Department of the Interior,
Office of
Superintendent for the Five Civilized Tribes,
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes and that the above and foregoing is a true and correct copy of Creek Census Card No. 2733.

(Seal)

Gabe E. Parker,
Superintendent for the Five Civilized Tribes.

Dec. 22, 1920. HJH

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

MUSKOGEE LAND OFFICE.

Allowments of land and homestead designations, as heretofore described, are hereby made to the following named persons

[illegible]

Dated at Mudgeer, Indian Territory, this..... 7th day
of..... November..... 1907..

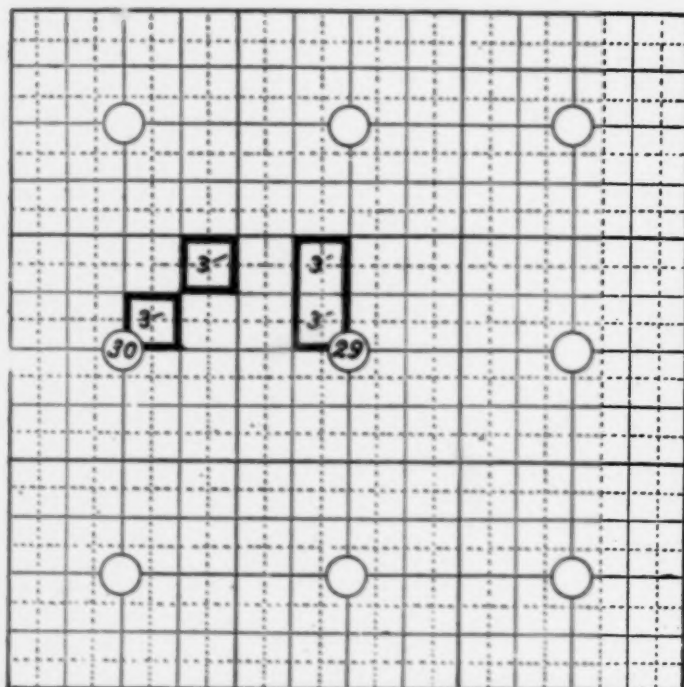
July 27-1902

John



(142)

DEPARTMENT OF THE INTERIOR.

Creek Nation.Township No. 17 N Range No. 9 E

Department of the Interior.

No.

In the Matter of the Allotment of the Lands of the Creeks.

Creek Nation.

To the Chief Clerk, Creek Land Office:

This is to certify that the name of Cheparney Larney (represented by Arbitrary) appears upon the roll of new born citizens by blood of the Creek Nation, approved by the Secretary of the Interior, No. 1287, and is entitled to an allotment of the lands of the Creek Nation under the Act of Congress approved March 3, 1905.

Commissioner.

Muskogee, Ind. Ter. Nov. 7, 1907. SCP

Department of the Interior,
Commissioner to the Five Civilized Tribes.

SCP

NBC 1287

Muskogee, Indian Territory,
July 18, 1907.

Jacob Larney,
Hanna, Indian Territory.

Dear Sir: You are hereby advised that on March 4, 1907, the Secretary of the Interior approved the enrollment of your minor child, Cheparney Larney, as a citizen by blood of the Creek Nation, and that the name of said child appears upon the roll of new born citizens of the Creek Nation opposite Number 1287.

The child is now entitled to an allotment and application therefor should be made without delay at the Creek Land Office, Muskogee, Indian Territory.

You are therefore notified that 90 days from the date of this letter will be allowed you in which to appear at the Creek Land Office, in Muskogee, Indian Territory, and designate the land desired to be allotted your minor child. If, at the expiration of the said 90 days, you have failed to so appear for the purpose of making a selection the Commissioner will allot the necessary amount of land for the completion of the said allotment.

It is therefore important to you that you appear at the Muskogee Office and make selection of allotment as soon as possible.

Respectfully,

W. C. Polock,
Acting Commissioner.

MJC

Creek Nation NBC 1287

May 8, 1908.

Mr. Jacob Larney,
Hanna, Oklahoma.

Sir: You are hereby advised that on November 7, 1907, the Commissioner arbitrarily allotted to your minor child, Cheparney Larney, whose name appears upon the New Born Creek Indian roll opposite No. 1287, as surplus,

The SW/4 of the NE/4 of Section 30 and the E/2 of the NW/4 of Section 29, Township 17 North, Range 9 East;

for the homestead,

The NE/4 of the NE/4 of Section 30, Township 17 North,
Range 9 East,

and certificates for the above described allotment selection

will be mailed to you at the expiration of nine months from the date of the filing thereof.

Respectfully,

SCP (RL).

Commissioner.

Department of the Interior,
Office of Superintendent for the Five Civilized Tribes,
Muskogee, Oklahoma.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of Entire Allotment Record in re Cheparney Larney, Creek New Born Citizen Roll No. 1287, as follows.

Arbitrary Allotment; Plat; Citizenship Certificate; Letters dated July 18, 1907, and May 8, 1909.

(Seal)

Gabe E. Parker,

Superintendent for the Five Civilized Tribes.

Dec. 22, 1920. HJH

(Waiver of Notice of Filing Statement of Evidence.)

We, the undersigned solicitors for the plaintiff, Cheparney Larney, hereby waive notice of the filing of the foregoing statement of evidence before approval of the same, and agree that the same is a complete and correct statement of the evidence introduced upon the trial of this cause and that the same may be approved and made a part of the record in said cause without further notice to us.

This 12th day of August, 1922.

H. B. REUBELT,

CLARK NICHOLS.

Order Approving the Foregoing Statement of the Evidence.

The above and foregoing statement of the evidence being this day presented to me, and it appearing that solicitors for the plaintiff have waived notice of the lodging of the same with the Clerk and have agreed that the same is a complete and correct statement of the evidence offered upon the trial of this cause and that the same may be approved and made a part of the record without further notice to them, and it

appearing that the said statement of the evidence is complete and correct, the same is hereby approved and made a part of the record in said cause for the purpose of appeal.

This 15th day of August, 1922.

R. L. WILLIAMS, Judge.

Filed Aug. 15, 1922. W. V. McClure, Clerk.

Petition for Appeal.

In the District Court of the United States for the Eastern District of Oklahoma.

Cheparney Larney, a minor, by his legal guardian, Bennie Green, Plaintiff, v. L. B. Norton, Bettie, Kizzie Gouge, Okchumpulla, and Suckcho and Alberta Gouge and Sam Gouge by Ernest Gouge, their legal guardian, and Nogo-wee, by Jim Hill, his legal guardian, Defendants.—Equity No. 2658.

To the Honorable Robert L. Williams, District Judge:

The above named defendants feeling themselves aggrieved by the decree made and entered in this cause on the 3rd day of January, A. D. 1922, do hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the assignment of errors which is filed herewith, and they pray that their appeal be allowed, and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri.

And your petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

G. R. HORNER,

GIBSON & HULL,

Solicitors for Defendants.

Filed in open court Jul. 1, 1922. W. V. McClure, Clerk.

Assignments of Error.

Now come the defendants in the above entitled cause and file the following assignments of error upon which they will rely upon their prosecution of the appeal in the above entitled cause from the decree made by this honorable court on the 3rd day of January, 1922.

I.

The said court erred in finding that the plaintiff herein, Cheparney Larney, was the person enrolled by the Dawes Commission on the New Born Creek Indian Roll opposite Roll No. 1287.

II.

The said court erred in refusing to hold that the enrollment record of the person enrolled on the New Born Creek Indian Roll opposite Roll No. 1287 as Cheparney Larney was conclusive of the fact that such person was the child of Big Jack, enrolled on the Creek Indian Roll opposite Roll No. 8291, and Bettie, enrolled on the Creek Indian Roll opposite Roll No. 8292.

III.

The said court erred in admitting any testimony to contradict the enrollment record of the said allottee, Cheparney Larney, and in admitting testimony for the purpose of showing that said allottee was not the child of the said Big Jack and the said Bettie, as found by the Dawes Commission.

IV.

The said court erred in admitting any evidence for the purpose of impeaching the decision of the Commission to the Five Civilized Tribes rendered February 23, 1907, adjudging that the Cheparney Larney enrolled on the New Born Creek Indian Roll opposite Roll No. 1287 was the child of Big Jack and Bettie, whose names appear on schedule of citizens by blood of the Creek Nation approved by the Secretary of the Interior March 28, 1902, opposite Nos. 8291 and 8292, respectively.

V.

The said court erred in admitting in evidence over the objection of these defendants Exhibit No. 7, purporting to be a record of testimony of one Jacob Larney, or Tiger, taken by W. H. Angell on March 19, 1910, to the effect that he was the father of a child who was given the name Cheparney Larney, and whose mother was Lucy Green, for the reason that same was incompetent as tending to impeach the decision of the Commission to the Five Civilized Tribes finding that said Cheparney Larney was the child of Big Jack and Bettie, and for the further reason that the same was made long subsequent to the enrollment of said allottee, Cheparney Larney.

VI.

The said court erred in admitting in evidence over the

objection of the defendants, Plaintiff's Exhibit No. 8, which was the Census Card of one Lucy Green showing her to be enrolled on the final rolls of citizens by blood of the Creek Nation opposite No. 8361, the daughter of Bennie Green and Sallie Green, for the reason that same was incompetent for the purpose of impeaching the enrollment record of Cheparney Larney and upon its face showed that the said Lucy Green was not the person found by the Commission to the Five Civilized Tribes to be the mother of said allottee, Cheparney Larney.

VII.

The said court erred in admitting in evidence over the objection of these defendants, Plaintiff's Exhibit No. 2, being the Census Card of one Jacob Tiger, showing him to have been enrolled on the rolls of Creek citizens by blood opposite No. 7968, as the child of Tiger and Mollie Dixon, for the reason that the same was incompetent to impeach the record of the Commission to the Five Civilized Tribes enrolling said Cheparney Larney, and showing upon its face that the said Jacob Tiger was not the person found by the Commission aforesaid to be the father of said allottee.

VIII.

The said court erred in rendering its final decree in this cause for the reason that the bill filed in this cause failed to contain any allegations sufficient to vest this court with jurisdiction of this cause, and for the reason that the record in this cause does not show that this court had jurisdiction thereof.

Wherefore, the defendants pray that said decree be reversed, and the District Court directed to dismiss the bill at the cost of the plaintiff, or for such other relief as to the court may seem proper.

G. R. HORNER,
GIBSON & HULL,
Solicitors for Defendants.

Filed in open court, Jul. 1, 1922. W. V. McClure, Clerk.

Order Allowing Appeal.

Now on this the 1st day of July, A. D. 1922, the defendants above named having presented their petition for appeal, and after duly considering the same it appearing that same should be allowed;

It is, therefore, considered, ordered and adjudged that said petition for appeal be, and hereby is, allowed upon giving a bond by said defendants conditioned as provided by law with good security in the penal sum of \$500.00.

R. L. WILLIAMS, Judge.

Filed in open court, Jul. 1, 1922, W. V. McClure, Clerk.

Bond on Appeal.

Know all men by these presents: That we, L. B. Norton, Bettie, and Kizzie Gouge, Okchumpulla, and Suckcho, Sam and Alberta Gouge, by Ernest Gouge, their legal guardian, and Nogowee, by Jim Hill, his legal guardian, as principals, and U. S. Fidelity & Guaranty Co. as surety, are held and firmly bound unto Cheparney Larney in the full and just sum of \$500.00, to be paid to the said Cheparney Larney, his heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents.

Sealed with our seals and dated this 30th day of June, in the year of our Lord, 1922.

Whereas, lately on the 3rd day of January, 1922, in a suit pending in said court between Cheparney Larney, a minor, by Bennie Green, his legal guardian, plaintiff, and L. B. Norton, Bettie, Kizzie Gouge, Okchumpulla, and Suckcho, Sam and Alberta Gouge, by Ernest Gouge, their legal guardian, and Nogowee, by Jim Hill, his legal guardian, defendants, a decree was rendered against the said defendants, and the said defendants have obtained the allowance of an appeal of the said cause to reverse the decree in the aforesaid suit, and a citation directed to the said Cheparney Larney citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said defendants shall prosecute said appeal to effect and pay all costs, if they fail to make good their plea, then the above obligation to be void, else to remain in full force and effect.

L. B. NORTON,
BETTIE,
KIZZIE GOUGE,
OKCHUMPULLA,
SUCKCHO,

SAM & ALBERTA GOUGE,

By Earnest Gouge,
Their Guardian,

NOGOWEE,

By Jim Hill,
His Guardian,
Principals.

By G. R. HORNER,
Their Solicitor.

U. S. Fidelity & Guaranty Co.,

By **BEN G. HARNED,**
Attorney in Fact.

Approved the 1st day of July, 1922.

R. L. WILLIAMS,

Judge of the United States District Court
for the Eastern District of Oklahoma.

Filed in open court, Jul. 1, 1922. W. V. McClure, Clerk.

Citation.

United States of America to Cheparney Larney, a Minor by
Bennie Green, his Legal Guardian, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, in the State of Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the District Court of the United States for the Eastern District of Oklahoma, wherein L. B. Norton, Bettie, Kizzie Gouge, Okchumpulla, Suckcho, Sam and Alberta Gouge, minors, by Ernest Gouge, their legal guardian, and Nogowee, by Jim Hill, his legal guardian, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Robert L. Williams, Judge of the United States District Court for the Eastern District of Oklahoma, this the 1st day of July, A. D. 1922.

R. L. WILLIAMS,

United States District Judge.

Due and legal service of the foregoing citation upon Cheparney Larney, a minor, and Bennie Green, his legal guardian, the plaintiff, is hereby acknowledged to have been made on this 8th day of July, 1922.

H. B. REUBELT,
CLARK NICHOLS,

Solicitor of record for Cheparney
Larney, a minor, and Bennie Green,
his legal guardian.

Praecipe for Printing Record and Election as to Printing
Record.

To the Clerk of said Court:

You are hereby requested to make a transcript of the record in the above entitled cause to be filed in the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript the following and no other papers or exhibits, to-wit:

1. Bill of Complaint.
2. Answer of defendants L. B. Norton, Big Jack and Bettie.
3. Reply of plaintiff.
4. Order allowing amended answer of defendants to be filed.
5. Amended answer of defendants L. B. Norton, Big Jack and Bettie.
6. Statement of the evidence.
7. Final Decree.
8. Motion of heirs of Big Jack to revive the cause.
9. Order allowing revival and substituting heirs of Big Jack as parties defendant.
10. Petition for appeal.
11. Assignments of error.
12. Order allowing appeal.
13. Bond on appeal.
14. Citation, and acceptance of service.
15. This Praecipe and acceptance of service thereon.
16. Certificate of Clerk.

And in this connection appellants do hereby elect to have the transcript of the record in the above entitled cause print-

ed under the supervision of the Clerk of the United States District Court for the Eastern District of Oklahoma.

G. R. HORNER,
N. A. GIBSON,
J. L. HULL,
T. L. GIBSON,

Solicitors for L. B. Norton, Bettie Kizzie Gouge, Okchumpulla and Suckcho, Sam and Alberta Gouge, minors by Ernest Gouge their legal guardian and Nogowee, a minor by Jim Hill, his legal guardian, Appellants.

The undersigned solicitors for the appellee, Cheparney Larney, a minor by Bennie Green, his legal guardian, hereby acknowledge service of the above and foregoing praecipe and notice of election of the appellants to file in the United States Circuit Court of Appeals for the Eighth Circuit a printed transcript of the record in said case; and the said solicitors for the said appellee hereby agree that the said printed transcript in said case shall contain a copy of the parts of the record specifically named in said praecipe and no other; and further agree that the same may be printed under the supervision of the Clerk of the United States District Court for the Eastern District of Oklahoma.

Dated this 8th day of July, A. D., 1922.

H. B. REUBELT,
CLARK NICHOLS,

Solicitors for appellee, Cheparney Larney, a minor by Bennie Green, his legal Guardian.

Filed Jul. 10, 1922. W. V. McClure, Clerk.

Certificate of Clerk.

United States of America,
Eastern District of Oklahoma—ss.

I, W. V. McClure, Clerk of the United States District Court for the Eastern District of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct transcript of so much of the record in the case of *Cheparney Larney, etc., v. L. B. Norton, et al.*, No. 2658 Equity, as was

ordered by praecipe of counsel herein to be prepared and authenticated, as the same appears from the records in my office.

I further certify that the citation attached hereto, and returned herewith, is the original citation issued in this cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Muskegee, this 28th day of August, A. D. 1922.

W. V. McCLURE, Clerk,

(Seal)

By WARREN BUTZ, Deputy.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, DECEMBER TERM, A. D. 1922

No. 6164

[Title omitted]

OPINION—Filed April 25, 1923

Mr. J. L. Hull (Mr. G. R. Horner, Mr. N. A. Gibson and Mr. T. L. Gibson were with him on the brief) for appellants.

Mr. H. B. Reubelt (Mr. E. J. Van Court and Mr. Clark Nichols were with him on the brief), for appellees.

Before Kenyon, Circuit Judge, and Booth and Johnson, District Judges

BOOTH, *District Judge*, delivered the opinion of the Court.

This is a suit to quiet title to certain land in appellee (plaintiff below); to cancel a deed of the land made by some of the defendants to the defendant Norton; and to enjoin defendants from asserting any claim against plaintiff to the land. Upon the trial decree was entered for plaintiff.

In this Court for the first time, appellant challenges the jurisdiction of the Court below. Nevertheless, it is the duty of this Court to consider the question of jurisdiction as in every case, and whether raised by the parties or not. *C. B. & Q. R. R. Co. v. Willard*, 220 U. S. 413; *Louisville & Nashville R. R. v. Mottley*, 211 U. S. 149; *Garvin v. Kogler*, 272 Fed. 442.

It is conceded that there is no diversity of citizenship between the parties, but jurisdiction is rested upon the ground that the suit is one arising under a law of the United States.

The rules for pleading jurisdictional facts are well settled. The facts must be set forth in the plaintiff's complaint by distinct averment and not by inference. They must be contained in a statement of the plaintiff's own cause of action and not by way of anticipation of some defense. *Shulthis v. McDougal*, 225 U. S. 561; *Hull v. Burr*, 234 U. S. 712; *Taylor v. Anderson*, 234 U. S. 74; *Joy v. St. Louis*, 201 U. S. 332.

It is not sufficient that title to land is claimed under a law of the United States unless the suit really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law upon the determination of which the result depends. *Joy v. St. Louis*, *Supra*; *Shulthis v. McDougal*, *Supra*; *Scott v. First National Bank*, 285 Fed. 832; *Earnhart v. Switzler*, 179 Fed. 832.

Applying these rules to the complaint in the present case, we are of opinion that the averments were not sufficient to show jurisdic-

tion. However, where the jurisdiction is not challenged by a pleading, but the question is raised for the first time in the Appellate Court, jurisdiction sufficiently appears if it is shown in any part of the record including the proofs. *Robertson v. Cease*, 97 U. S. 643, 648; *Sun Printing Assn. v. Edwards*, 194 U. S. 377, 382; *Horne v. Hammond Co.*, 155 U. S. 393; *Doolan v. Carr*, 125 U. S. 618; *Mahoning Valley Railway Co. v. O'Hara*, 196 Fed. 945.

From the pleadings and the proofs contained in the record in the present case, it clearly appears, and will be adverted to later, that plaintiff's claim is based upon one construction of the act of March 3, 1905, while defendant's claim is based upon a different construction of the same act. This made a Federal question and the Court below had jurisdiction of the cause.

The land in question was an allotment pursuant to Act of Congress, March 1, 1901, (31 Stat. 861), made to a citizen of the Creek Tribe of Indians named in the deeds as Cheparney Larney. It is the claim of plaintiff that he is the person who was enrolled as a full-blood Indian on the Creek tribal rolls opposite Roll No. 1287, and that he thereby became entitled to an allotment, and that he in fact received the allotment in question. It is the claim of defendants that the person who was enrolled was not the plaintiff, but a son of "Big Jack," one of the original defendants; that the son died about November, 1906, and that the defendants succeeded to the rights of said deceased son in the allotted land. A vital question in the case is, therefore, one of identity and it involves the construction of the decision of the Commissioner to the Five Civilized Tribes granting and ordering the enrollment involved, and also of the statute under which the Commissioner was acting. The decision of the Commissioner is as follows:

"NC 1010.

OCH CM.

Department of the Interior

Commissioner to the Five Civilized Tribes

In the Matter of the Application for the Enrollment of CHEPARNEY
LARNEY as a Citizen by Blood of the Creek Nation

Decision

It appears from the records of this office that on April 24, 1905, testimony was offered 'In the matter of the application for the enrollment of certain new borns, as citizens of the Creek Nation' which embraced a child of Jacob Larney (or Green) and Bettie Larney (or Green), which is herein considered as an original application for the enrollment of said person as a citizen by blood of the Creek Nation. Further proceedings were had February 16, 1907.

It appears from the testimony that about July 19, 1905, a Creek field party went to the home of said child for the purpose of obtaining information with reference to the right to enrollment of said

child, and that the parents refused to give such information because of the influence over them of the Snake or disaffected faction of the Creeks; that the clerk in charge is under the impression that said child is a male but states that he could not learn the name of said child. In view of the fact that the full name of said child could not be ascertained, and that it is believed that said child is a male, reference to said person will hereinafter be made under the name of Cheparney Larney, the Creek word 'Cheparney' signifying 'little boy.'

The evidence and the records of this office show that said Cheparney Larney is the child of Jacob Larney and Bettie Larney, whose names appear as 'Big Jack' and 'Bettie' on a schedule of citizens by blood of the Creek Nation, approved by the Secretary of the Interior March 28, 1902, opposite Nos. 8291 and 8292 respectively.

The evidence shows that about July 19, 1905, said Cheparney Larney appeared to be about one year old.

Although the evidence herein is not as full and complete as has heretofore been required by this office to establish the right of a person to be enrolled as a citizen of the Creek Nation, in view of the provisions of the Act of Congress approved April 26, 1906, (34 Stat. L. 137), fixing March 4, 1907, as the date after which the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person as a citizen of said Nation, it is believed that the evidence herein should be considered sufficient to establish the facts necessary to enrollment.

It is, therefore, ordered and adjudged that said Cheparney Larney is entitled to be enrolled as a citizen by blood of the Creek Nation, under the provisions of the Act of Congress approved March 3, 1905, (33 Stat. L. 1048), and the application for his enrollment as such is accordingly granted.

Tams Bixby, Commissioner.

Muskogee, Indian Territory, Feb. 23, 1907."

It is undisputed that the allotment deeds to the land were delivered to the father of plaintiff, and that plaintiff has been in possession of the land since prior to the commencement of the present suit.

The Court below, holding that there was an ambiguity in the record, received evidence as to the identity of the person enrolled, and decided in favor of the plaintiff. It is the contention of appellants in this court:

(1) That the Commissioner's decision is conclusive evidence that the person enrolled was the child of "Big Jack" and Bettie, his wife.

(2) That if the decision of the Commissioner is not conclusive to that effect, yet that the weight of the evidence introduced upon the trial establishes the fact.

1. The Dawes Commission was a special tribunal having judicial powers. Its judgments were conclusive, in the absence of fraud or

gross mistake or arbitrary action, as to the questions it was authorized to decide, and also as to every issue of law and fact that it was necessary for it to determine in order to decide those questions. *U. S. v. Wildcat*, 244 U. S. 111; *Kimberlin v. Commission to Five Civilized Tribes*, 104 Fed. 653; *Malone v. Alderdice*, 212 Fed. 668; *Folk v. U. S.*, 233 Fed. 177; *Nunn v. Hazelrigg*, 216 Fed. 330; *U. S. v. Atkins*, 268 Fed. 923.

But the decisions of the Commission and the recitals and reports contained therein as to matters whose determination was not indispensable to enable it to adjudicate who should be enrolled, what lands should be allotted to those enrolled and how, are not of judicial or conclusive effect. *Malone v. Alderdice*, *supra*; *Porter v. U. S.*, 260 Fed. 1; *U. S. v. Lena*, 261 Fed. 144. See also *Hegler v. Faulkner*, 153 U. S. 109, 117.

Applying these principles to the case at bar, it is clear that the main question before the Commissioner to the Five Civilized Tribes for determination at the time he rendered the above decision was whether or not the applicant whose case he was considering was entitled to be enrolled under the Act of March 3, 1905. That Act, so far as here material, provided:

"That the Commission to the Five Civilized Tribes is authorized for sixty days after the date of the approval of this Act to receive and consider applications for enrollments of children born subsequent to May twenty-five, nineteen hundred and one, and prior to March fourth, nineteen hundred and five, and living on said latter date, to citizens of the Creek tribe of Indians whose enrollment has been approved by the Secretary of the Interior prior to the date of the approval of this Act; and to enroll and make allotments to such children."

It is apparent from the wording of the statute that the applicant, to be entitled to enrollment, must have been (1) born subsequent to May 25, 1901; (2) born prior to March 4, 1905; (3) living on March 4, 1905; (4) born to citizens of the Creek Tribe whose enrollment had been approved by the Secretary of the Interior prior to March 3, 1905. The enrollment of the applicant, and especially when followed, as in the case at bar, by a certificate as to allotment and by allotment deeds or patents, would be conclusive that these four matters had been decided favorably to the applicant. Cases *supra*.

But, any findings or recitals on matters other than these, for example, the exact age of the applicant, as in *Malone v. Alderdice*; or the exact names of the parents as in *Porter v. U. S.*; or the marital relationship of the applicant, as in *U. S. v. Lena*, would not be of binding or conclusive effect, because they were not required to be found either by the statute, or as the necessary basis for the decision. And, for like reason, a finding as to the sex of the applicant, or as to the enrollment numbers of the parents of the applicant, or their aliases, would not be conclusive. Such matters might be stated as aids to identify the applicant, but mistakes in such statements would not affect the validity of the patent, nor prevent the applicant from

proving his identity. The two classes of findings must not be confused.

In the decision of the Commissioner there is a recital that the applicant was a child of Jacob Larney (or Green) and Bettie Larney (or Green). There is also a finding that about July 19, 1905, the applicant appeared to be about one year old. This was equivalent to findings that the applicant was born subsequent to May 25, 1901, but prior to March 4, 1905, and was living on the latter date.

The finding upon which appellants rely is this: "The evidence and the records of this office show that said Cheparney Larney is the child of Jacob Larney and Bettie Larney, whose names appear as 'Big Jack' and 'Bettie' on a schedule of citizens by blood of the Creek Nation, approved by the Secretary of the Interior March 28, 1902, opposite Nos. 8291 and 8292 respectively."

The only material fact here found was that the enrollment of the child's parents, already recited as Jacob Larney and Bettie Larney, as citizens of the Creek Tribe, had been approved by the Secretary of the Interior prior to March 3, 1905. This fact was a matter of record with the Commissioner; and this record evidence introduced at the present trial showed that their enrollment was approved by the Secretary of the Interior on March 28, 1902, as the finding alleges. The recital to the effect that Jacob Larney and wife were identical with "Big Jack" and wife, and the recital of the roll numbers, were unnecessary and of no binding effect. Suppose that there had been an actual pending controversy whether the child whose application was being considered was the child of Jacob Larney and wife, or of "Big Jack" and wife. It is clear, since the enrollment of all of these four people had been approved by the Secretary of the Interior prior to March 3, 1905, as shown by the records in evidence, that the Commissioner would not have been called upon to decide the dispute as to parentage; and, if he had decided it, the decision would not be binding. The only finding that was material for the Commissioner to make was that the enrollment of the parents, whoever they were, being citizens of the Creek Tribe, had been approved by the Secretary of the Interior prior to March 3, 1905. Omitting from this finding the surplusage as to the aliases of Jacob Larney and wife and the numbers of the enrollment, the essential part remains that they were citizens of the Creek Tribe, and that their enrollment had been approved by the Secretary of the Interior, on March 28, 1902.

The cases relied upon by appellants and cited above, as to the conclusive effect of findings by the Commissioner, are in harmony with these views. They all hold that findings which are necessary to the adjudication are conclusive. But they also clearly hold that findings which are not necessary to the adjudication are not conclusive.

Appellants themselves abandon the theory that this finding upon which they rely is conclusive in its entirety. Their whole case depends upon a rejection of that part of the finding relating to the identity of Jacob Larney and wife with "Big Jack" and wife. The decision of the Commissioner in our opinion was ambiguous as to the identity of the applicant, and extrinsic evidence was admissible to prove it.

2. The evidence, extrinsic of the decision of the Commissioner, as to the identity of the plaintiff with the applicant who was actually enrolled, is to our minds clear and convincing. The testimony of Posey that the child whom he reported for enrollment was the child of Jacob Larney and wife; found by him at their house; the evidence that this report and Posey's testimony were the basis of the application for the enrollment actually made; that the parents of the child whom Posey reported were unwilling to give the child's name owing to the antagonistic attitude of the maternal grandfather, and that the Commissioner being unable to find out the real name of the child named it "Cheparney Larney;" that the three sons of "Big Jack" were all accounted for on the records of the Commission, two of them having been enrolled and one rejected; that Posey did not visit the house of "Big Jack" and report his children, but such report was made by a different agent; that Jacob Larney whose boy Posey reported was of Arbeka Tullledge Town, and his wife of Hillabee Town, and that the record evidence shows such to be the facts as to plaintiff's father and mother, but not to be the facts as to "Big Jack" and his wife; that the government officials in July, 1907, notified Jacob Larney of the enrollment of his son, and requested him to make a selection of lands; that the government officials again, in May, 1908, notified Jacob Larney of an arbitrary allotment of lands to his son, which is the allotment here in controversy; that the deeds to the allotment were delivered to Jacob Larney for his son, the present plaintiff, and that possession of the lands was taken on behalf of the plaintiff, and that no claim to the land was made by "Big Jack" for years, all establishes clearly that the applicant before the Commissioner was the present plaintiff, the child of Jacob Larney and wife, that he was the person enrolled and that this was so understood by the Commissioner.

The testimony on behalf of the defendants, that the son (now dead) of "Big Jack" was commonly called in his neighborhood Cheparney Larney corroborates rather than weakens the above conclusion, because the Commissioner would not have been likely to state in his decision that the name of the boy whose application he was considering could not be ascertained, if in fact he was considering the case of "Big Jack's" boy, whose name was well known.

We are of opinion that the evidence clearly identified the plaintiff as the person enrolled by the Commissioner and entitled to the allotment of the land in controversy.

Judgment Affirmed.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, DE-
CEMBER TERM, 1922, MONDAY, APRIL 30, 1923

No. 6164

L. B. NORTON, BETTIE, KIZZIE GOUGE, OKCHUMPULLA, SUCKCHO,
Sam, and Alberta Gouge, Minors, by Ernest Gouge, Their Legal
Guardian, and Nogowee, by Jim Hill, His Legal Guardian, Ap-
pellants,

vs.

CHEPARNEY LARNEY, a Minor, by BENNIE GREEN, His Legal
Guardian.

Appeal from the District Court of the United States for the Eastern
District of Oklahoma

DECREE

This cause came on to be heard on the transcript of the record from
the District Court of the United States for the Eastern District of
Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and
decreed by this Court, that the decree of the said District Court, in
this cause, be, and the same is hereby, affirmed with costs; and that
Cheparney Larney, a minor, by Bennie Green, his legal guardian,
have and recover against L. B. Norton, Bettie, Kizzie Gouge, Okchum-
pulla, Suckcho, Sam and Alberta Gouge, minors, by Ernest Gouge,
their legal guardian, and Nogowee, by Jim Hill, his legal guardian,
the sum of twenty dollars for their costs herein and have execution
therefor.

April 30, 1923.

IN U. S. SUPREME COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed July 13, 1923

To the Honorable William H. Taft, Chief Justice, or any Associate
Justice of the Supreme Court of the United States:

Come now the appellants by their solicitors, and complain that in
the record and proceedings, and also in the rendition of the decree
of the United States Circuit Court of Appeals for the Eighth Circuit,
sitting at Saint Louis, in the State of Missouri, in the above styled
and numbered cause, on the 30th day of April, A. D. 1923, affirm-
ing the decree of the United States District Court for the Eastern
District of Oklahoma in said cause, manifest error has intervened
to the great damage of the petitioners; that the jurisdiction of the

District Court of the United States for the Eastern District of Oklahoma, if there were jurisdiction in that Court of this cause, depended upon the fact that the matter in controversy exceeded, exclusive of interest and costs, the sum and value of Three Thousand Dollars (\$3,000), and that the suit arose under the constitution or laws of the United States or treaties made under their authority; that the amount involved therein and the matter under consideration exceeds the sum of One Thousand Dollars (\$1,000.00) besides costs, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final; and for the purpose of showing that said matter in controversy exceeds the sum of One Thousand Dollars (\$1,000.00) besides costs, petitioners herein attach as Exhibit "A" and make a part hereof a stipulation entered into between the solicitors of record for the parties to this cause, by which it is stipulated and agreed that the lands involved and the amount in controversy does exceed the sum of One Thousand Dollars (\$1,000.00) besides costs.

Wherefore, petitioners pray for an allowance of appeal to the end that the cause may be carried to the Supreme Court of the United States, and petitioners pray for such other process as is required to perfect the appeal prayed for, to the end that the error therein may be corrected.

Nathan A. Gibson, Joseph L. Hull, Thomas L. Gibson, Glenn R. Homer, Solicitors for Petitioners.

Appeal allowed and bond fixed in the sum of \$500.00, conditioned as the law directs, this the 11 day of July, A. D. 1923.

Kimbrough Stone, Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

IN U. S. CIRCUIT COURT OF APPEALS

STIPULATION AS TO THE AMOUNT INVOLVED UPON APPEAL—Filed
July 13, 1923

It is stipulated and agreed by and between the parties to this cause, by and through their solicitors of record, that the land described in the bill of complaint herein, to-wit:

The East Half (E./2) of the Northwest Quarter (N. W./4) of Section Twenty-nine (29), and the Northeast Quarter (N. E./4) of the Northeast Quarter (N. E./4) and the Southwest Quarter (S. W./4) of the Northeast Quarter (N. E./4) of Section Thirty (30), Township Seventeen (17) North, Range Nine (9) East, in Creek County, Oklahoma;

is of a value in excess of One Thousand Dollars (\$1,000.00); and that the matter in controversy in this cause exceeds the sum of One Thousand Dollars (\$1,000.00) besides costs.

Dated this 9th day of July, A. D. 1923.

Nathan A. Gibson, Joseph L. Hull, Glenn R. Homer, Solicitors of Record for Appellants. Clark Nichols and Horace B. Reubelt, Solicitors of Record for Appellees Cheparney Larney, a Minor, and Bennie Green, His Legal Guardian.

[File endorsement omitted.]

IN U. S. CIRCUIT COURT OF APPEALS
ASSIGNMENTS OF ERROR—Filed July 13, 1923

Come now the appellants in the above entitled cause and file the following assignments of error, upon which they will rely upon their prosecution of the appeal in the above entitled cause from the decree made by the Honorable United States Circuit Court of Appeals for the Eighth Circuit, on the 30th day of April, A. D. 1923.

1

The said Court erred in affirming the decree of the United States District Court for the Eastern District of Oklahoma rendered in this cause, and in holding that the said United States District Court for the Eastern District of Oklahoma had jurisdiction to render its judgment in this cause, for the reason that the bill filed in this cause failed to contain any allegations sufficient to vest said District Court of the United States for the Eastern District of Oklahoma with jurisdiction to render a final decree herein, and for the reason that the record in this cause does not show that said District Court had jurisdiction thereof.

2

V The said United States Circuit Court of Appeals for the Eighth Circuit erred in refusing to hold that the enrollment record of the person enrolled on the New Born Creek Indian roll opposite roll number 1287 as Cheparney Larney was conclusive of the fact that such person was the child of Big Jack, enrolled on the Creek Indian roll opposite roll number 8291, and Bettie, enrolled on the Creek Indian roll opposite roll number 8292.

3

The said United States Circuit Court of Appeals for the Eighth Circuit erred in holding that the decision of the Commissioner to the Five Civilized Tribes in the matter of the enrollment of Cheparney

Larney did not conclusively identify the person enrolled as Cheparney Larney upon the New Born Creek Indian roll opposite number 1287 as the child of Big Jack, enrolled on the Creek Indian roll opposite number 8291, and Bettie, enrolled on the Creek Indian roll opposite number 8292.

4

The said United States Circuit Court of Appeals for the Eighth Circuit erred in finding and holding that the appellee, Cheparney Larney, was the person enrolled by the Commissioner to the Five Civilized Tribes upon the New Born Creek Indian roll opposite roll Number 1287.

Wherefore, the appellants pray that said decree be reversed and the cause remanded with directions that said bill be dismissed at the cost of the appellee, or for such other relief as to the Court may seem proper.

Nathan A. Gibson, Joseph L. Hull, Thomas L. Gibson, Glenn R. Homer, Solicitors for Appellants.

[File endorsement omitted.]

BOND ON APPEAL TO SUPREME COURT U. S.—Filed July 13, 1923;
for \$500.00; approved, Stone, J. [omitted in printing]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT

[Title omitted]

NOTICE TO THE CLERK TO MAKE TRANSCRIPT OF RECORD AND AC-
CEPTANCE OF SERVICE—Filed July 16, 1923

To the Clerk of said Court:

You are hereby requested to make a transcript of the record in the above entitled cause, to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause, and to include in such transcript the following, and no other, papers or exhibits, to-wit:

1. The transcript of record filed in this cause.
2. The decision or decree of the United States Circuit Court of Appeals entered in this cause.
3. Petition for appeal to the United States Supreme Court.
4. Assignments of error.

5. Order allowing appeal.
6. Bond on appeal.
7. Citation and acceptance of service.
8. This præcipe and acceptance of service thereon.
9. Certificate of the Clerk.
10. Opinion of the United States Circuit Court of Appeals in this cause.

Nathan A. Gibson, Joseph L. Hull, Thomas L. Gibson, Glenn R. Homer, Solicitors for Appellants.

The undersigned solicitors for the appellees, Cheparney Larney, a minor, and Bennie Green, his legal guardian, hereby acknowledge service of the foregoing præcipe; and the said solicitors for the said appellees hereby agree that the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit shall make a transcript of the record in the above entitled cause to be filed in the Supreme Court of the United States, and the same shall contain a copy of the parts of the record specifically named in said præcipe, and no other.

Dated this 13th day of July, A. D. 1923.

H. B. Reubelt, Clark Nichols, Solicitors for Appellees, Cheparney Larney, a Minor, and Bennie Green, His Legal Guardian.

[File endorsement omitted.]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

CITATION AND SERVICE—Filed July 16, 1923

The President of the United States of America to Cheparney Larney, a Minor, and Bennie Green, His Legal Guardian, Greetings:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty (30) days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein L. B. Norton, Bettie, Kizzie Gouge, Okchum-pulla, Suckcho, Sam and Alberta Gouge, minors, by Ernest Gouge, their legal guardian, and Nogowee, by Jim Hill, his legal guardian, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, shall not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this the 11th day of July, A. D. 1923.

Kimbrough Stone, Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

Due and legal service of the foregoing citation upon Cheparney Larney, a minor, and Bennie Green, his legal guardian, the appellees, is hereby acknowledged to have been made on this the 13th day of July, A. D. 1923.

H. B. Reubelt, Clark Nichols, Solicitors of Record for Cheparney Larney, a Minor, and Bennie Green, His Legal Guardian.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

CLERK'S CERTIFICATE

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Oklahoma as prepared, printed and certified by the Clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the Act of Congress, approved February 13, 1911, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the Notice to the Clerk to prepare Transcript, in a certain cause in said Circuit Court of Appeals wherein L. B. Norton, et al., were Appellants, and Cheparney Larney, a minor, by Bennie Green, his legal guardian, was Appellee, No. 6164, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the thirteenth day of July, A. D. 1923, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the Eastern District of Oklahoma.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this first day of August, A. D. 1923.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. [Seal of United States Circuit Court of Appeals, Eighth Circuit.]

Endorsed on cover: File No. 29,804. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 494. L. B. Norton, Bettie, Kizzie Gouge, Okchumpulla, et al., appellants, vs. Cheparney Larney, a minor, and Bennie Green, his legal guardian. Filed August 10th, 1923. File No. 29,804.



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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1923.

No. 494.

L. B. NORTON, BETTIE, KIZZIE GOUGE, OK-
CHUMPULLA, *ET AL.*, *Appellants*,

vs.

CHEPARNEY LARNEY, A MINOR, AND BENNIE
GREEN, HIS LEGAL GUARDIAN, *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF APPELLANTS.

Statement of the Case.

The question involved in this case is as to the conclusiveness as to identity of the decision of the Commissioner to the Five Civilized Tribes upon the enrollment of a Creek child under the Act of March 3, 1905 (33 Statutes at Large, 1071).

In the bill filed in the District Court of the United States for the Eastern District of Oklahoma

the plaintiff, claiming to be Cheparney Larney, alleged that he was enrolled as a full blood Indian opposite Creek Tribal Roll No. 1287 New Born Creek Roll; that he received the lands, the title to which is involved in the action, as a distributive share of the lands of the Creek Nation; that he went into possession of the same after allotment thereof and had been in the open, notorious, peaceable possession thereof since receiving patents therefor.

It is alleged that defendant, Big Jack (who died after the decree and whose heirs were substituted in his place—see order reviving cause, Tr., p. 8), who was enrolled as a full-blood Creek, opposite No. 8291, and the defendant, Bettie, enrolled as a full-blood Creek opposite No. 8292, claimed that Cheparney Larney is their son and is dead, and that acting upon such belief they executed a deed to the land described and petitioned the County Court of McIntosh County for an order approving said deed, and by reason thereof an order was obtained approving the same to the defendant, L. B. Norton, who had filed the deed for record in the office of the county clerk of Creek County, Oklahoma. The bill then denies that Big Jack and Bettie were father and mother of the plaintiff, but alleged that his father was Jacob Larney, sometimes known as Jacob Tiger, enrolled as full-blood Creek Indian opposite No. 7968, and that his mother was Bettie Larney, sometimes known as Lucy Green, enrolled as a full-blood Creek Indian opposite No. 8361.

He prays that he be decreed to be the identical person to whom said land was allotted, and that the deed executed by Big Jack and Bettie to L. B. Norton be declared null and void, and cancelled as a cloud upon his title, and that the defendants be enjoined from asserting any title and interest in the land described. (See Tr., pp. 1 to 3.)

The defendants in their amended answer to the bill denied that plaintiff was the person enrolled as Cheparney Larney opposite new born Creek roll No. 1287, and denied that the lands described in the petition were allotted to plaintiff or that he was entitled to the possession of the same, and alleged that he withheld possession of the land wrongfully from them for the reason that the land allotted under said roll number to Cheparney Larney was intended for and made to a deceased son of the defendants Big Jack and Bettie in pursuance of the Act of Congress of March 3, 1905, and various other acts prior thereto. They further stated that said deceased child was born in the year 1904, and died in November, 1906; that during his lifetime proceedings were commenced by the Commission to the Five Civilized Tribes to enroll said child, and much data and information was gathered and presented to the Commission from time to time. That on February 23, 1907, said Commission, after considering all the data and information before collected and presented, rendered a written decision which described Cheparney

Larney as the son of Big Jack and Bettie, who were identified in said decision by their Creek roll numbers as they appear upon the final rolls of said tribe, to-wit, 8291 and 8292, respectively.

Defendants admitted the execution and approval of the deed referred to in the complaint.

They prayed for a decree finding that Cheparney Larney was the son of the defendants, Big Jack and Bettie, and upon his death they inherited the land described in the complaint, and that the conveyance of the same to the defendant Norton vested Norton with title thereto. They further prayed that Norton be decreed to be the owner of the land and entitled to possession thereof, and that his title be forever quieted in him. (See Tr., pp. 4 to 6.)

Upon final hearing the court found in favor of the plaintiff and rendered a decree quieting plaintiff's title against the claims of defendants, canceling the deed referred to, and enjoining defendants from asserting any claim of any right, title or estate in the premises by virtue of said deed, hostile or adverse to the title of the plaintiff (Tr., pp. 6 and 7).

Evidence.

The evidence introduced in this cause shows that the proceedings for the enrollment of Cheparney Larney were commenced apparently by taking the testimony of one Alex Posey, a copy of which was offered as plaintiff's exhibit No. 1 (Tr., p. 21). He, on April 24, 1905, testified before the Commission that he had been engaged recently in the field for the Dawes Commission securing evidence about Creek citizens or new borns, and had a list of children for whom application could not be made and about whom he had succeeded in obtaining some information. Among others in this list appears the following: "Jacob Larney (or Green), Arbeka Tulledega Town, Bettie Larney (or Green), Hillabee Town, have a child. Post office, Hanna, Indian Territory" (Tr., p. 22). On February 16, 1907, Alex Posey was again sworn and examined and stated that on July 19, 1905, he went to the home of Jacob and Bettie Larney for the purpose of obtaining information with regard to a child of theirs. He was under the impression that the child was a boy, and it appeared at that time to be about a year old. The parents refused to give any information concerning the child. The father of the child's mother was very much opposed to the work of the Commission. He had made inquiries a short time before and was informed that the child was still living (Tr., p. 24).

The Commissioner to the Five Civilized Tribes, on February 23, 1907, handed down his decision in

the matter of the application for the enrollment of Cheparney Larney, which appears in full at page 25 of the transcript. The Commissioner found as follows:

“It appears from the testimony that about July 19, 1905, a Creek field party went to the home of said child for the purpose of obtaining information with reference to the right to enrollment of said child, and that the parents refused to give such information because of the influence over them of the Snake or disaffected faction of the Creeks; that the clerk in charge is under the impression that said child is a male but states that he could not learn the name of said child. In view of the fact that the full name of said child could not be ascertained, and that it is believed that said child is a male, reference to said person will hereinafter be made under the name of Cheparney Larney, the Creek word ‘Cheparney’ signifying ‘little boy’.

“The evidence and the records of this office show that said Cheparney Larney is the child of Jacob Larney and Bettie Larney, whose names appear as ‘Big Jack’ and ‘Bettie’ on a schedule of citizens by blood of the Creek Nation, approved by the Secretary of the Interior March 28, 1902, opposite Nos. 8291 and 8292, respectively.

“The evidence shows that about July 19, 1905, said Cheparney Larney appeared to be about one year old.

“Although the evidence herein is not as full and complete as has heretofore been required by this office to establish the right of a person to be enrolled as a citizen of the Creek Nation, in view

of the provisions of the Act of Congress approved April 26, 1906 (34 Stat. L. 137), fixing March 4, 1907, as the date after which the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person as a citizen of said Nation, it is believed that the evidence should be considered sufficient to establish the facts necessary to enrollment.

"It is, therefore, ordered and adjudged that said Cheparney Larney is entitled to be enrolled as a citizen by blood of the Creek Nation, under the provisions of the Act of Congress approved March 3, 1905 (33 Stat. L. 1048), and the application for his enrollment as such is accordingly granted.

Tams Bixby, *Commissioner*.

. Muskogee, Indian Territory, Feb. 23, 1907."

Pursuant thereto Cheparney Larney was placed upon the rolls of new born citizens by blood opposite No. 1287, his age was given as 1; sex, male; blood, full, and patents were subsequently issued covering the land involved in this suit.

The question at issue in this case is whether plaintiff is the person enrolled as Cheparney Larney, or whether the allottee was the deceased child of defendants, Big Jack and Bettie.

The testimony offered on behalf of the plaintiff, briefly, is to the effect that the plaintiff is the child of Jacob Larney, also known as Jacob Tiger, and Petey Larney, also known as Lucy Green or Lucy Tiger, enrolled however as Lucy Green, Jacob Larney being

enrolled as Jacob Tiger. That plaintiff while attending school and college was known as Artis or Articee Tiger, and in January, 1922, at the time of the trial was about 19 years old (see testimony of plaintiff, Tr., pp. 9, 10). That plaintiff's mother was the daughter of Ben Green, plaintiff's present guardian, and she and Jacob Tiger, her husband (or Jacob Larney) lived near Hanna, Oklahoma, and about a mile apart from Big Jack and his wife, Bettie. Big Jack was known as Jackie or Jakey Thlocco, and his wife Bettie had three sons known as Okchumpulla, Tecumseh and Okseetka. This Indian, Jackie Thlocco, is enrolled as Big Jack opposite No. 8291, and his wife Bettie is enrolled as Bettie opposite No. 8292. Jacob Larney died about 1916 (see testimony of Ben Green, Tr., pp. 10-12; J. H. Hill, pp. 12-13). Tecumseh and Okseetka are dead. Tecumseh lived to be a man and had children. Okseetka died when an infant (Tr., pp. 12-13; see testimony, too, of Joseph Pigeon, pages 13 and 14, and Lucy Green, p. 14).

On behalf of the defendants the evidence showed that Big Jack and Bettie had three boys, the oldest one named Tecumseh, the next one Okchumpulla, and the youngest one Cheparney. Cheparney was living at the time that Alex Posey was in that neighborhood. He died about 1906 (see testimony, Thomas Red, Tr., p. 16; George Simmons, p. 17; Cutsee Harjo, p. 17). Big Jack's wife, Bettie, was known also as Bettie Larney. Big Jack did not attempt to have

his children enrolled, but when Alex Posey was in the country trying to find the new born Creeks he had three boys, Tecumseh, Okchumpulla and a little boy they called Cheparney. This little boy was never called Okseetka. (See testimony of Big Jack and Bettie, Tr., pp. 18 and 19.)

The roll card for Cheparney Larney (see exhibit 1, Tr., opposite p. 20) shows Cheparney Larney: Age, March 4, 1905, one; sex, male; blood, full; name of father, Jacob Larney; father's roll No. 8291; name of mother, Bettie Larney; mother's roll No. 8292; born in 1904; remarks: "Application for enrollment of No. 1 received April 24, 1905; name of father appears on final roll No. 8291 as Big Jack. Name of mother appears on final roll No. 8292 as Bettie," and other remarks not relevant.

The plaintiff introduced the enrollment record for Okchumpulla and the decision by the Commissioner rendered therein February 19, 1907 (note that this was three days after Alex Posey testified regarding the child of Jacob and Bettie Larney, enrolled as Cheparney Larney, and four days before the decision of the Commissioner enrolling Cheparney). In this decision (Tr., pp. 31 and 32) the Commissioner says:

"The evidence shows that at the time of the original and only proceeding had herein the said Jackey Thlocco and Bettie Jack or Thlocco had two male children living named Okchumpulla and Okseetka, of which Okchumpulla was the

oldest. Such being the case, Okchumpulla must have been born prior to March 4, 1906."

And Jackie Thlocco and Bettie Jack or Thlocco are identified as those enrolled opposite 8291 and 8292, respectively. This decision was based upon the testimony of one William Barnett, given on July 9, 1906, which was as follows (Plaintiff's Ex. 4, Tr., p. 30):

He belonged to Hillabee Town and knew the following minor children for whose enrollment application had not been made: "Bettie Jack or Thlocco and Jackey Thlocco, both of Hillabee Town, have two children. The oldest is named Okchumpulla and the other Okseetka. Both children are boys and are living." And the postoffice address of the parents is given as Hanna. This testimony was given on July 9, 1906. That was all there was in Barnett's testimony. A decision of the Commissioner upon this in regard to the enrollment of Okseetka was also offered (see Tr., p. 33), in which the Commissioner found:

"The evidence shows that at the time of the original and only proceeding had herein the said Jackey Thlocco and Bettie Jack or Thlocco had a male child named Okseetka, but there is nothing whatever to show when said child was born, whether prior to or subsequent to the 4th day of March, 1906, although diligent efforts have been made by this office through field parties to obtain such information.

"In view of the foregoing I am of the opinion that there is no authority of law for the enrollment of said Okseetka as a citizen by blood

of the Creek Nation, and the application for his enrollment as such is accordingly dismissed.”

This decision was also rendered on February 19th, 1907.

The census card of Big Jack was introduced (see opposite page 38) showing him to be enrolled opposite No. 8291 as Big Jack, age 50, sex male, full-blood, tribal enrollment as Hillabee Canadian; and his wife Bettie enrolled opposite 8292, age 40, full-blood, tribal enrollment Hillabee Canadian; their enrollment being approved on March 28, 1902, the card being dated May 23, 1901.

Lucy Green's card (plaintiff's Exhibit No. 14) shows she was enrolled as a full-blood opposite No. 8361 on May 23, 1901, as 18 years of age, tribal enrollment being Hillabee Canadian, and Jacob Tiger was enrolled opposite No. 7968 under the name of Jacob Tiger, as 45 years of age, a full-blood, tribal enrollment Tulladegree, on May 23, 1901 (see plaintiff's Exhibit No. 15).

The United States Circuit Court of Appeals for the Eighth Circuit affirmed the decree below, holding in effect that the decision of the Commissioner to the Five Civilized Tribes upon the application for the enrollment of Cheparney Larney did not conclusively determine that he was the child of Big Jack and Bettie, the original defendants in this cause (Tr., pp. 50, 55). Although it was alleged in the bill that there was no diversity of citizenship between the parties,

and although the bill did not set forth or allege that the action was one arising under a law of the United States, the Circuit Court of Appeals nevertheless held that jurisdiction in the court below was rested upon the fact that a construction of the Act of March 3, 1905, was necessarily involved and that this made a federal question which gave the court below jurisdiction of the cause. Upon the claim made by the plaintiff and sustained by the Circuit Court of Appeals that jurisdiction was invoked because the case involved a federal question, there being no diversity of citizenship, the decision of the Circuit Court of Appeals is not final and would be reviewable in this court under section 241, Judicial Code.

—*Spiller v. A. T. & S. F. R. R. Co.*, 253 U. S. 117, 64 Law. ed. 810.

SPECIFICATIONS of ERROR.

The specifications of error upon which the appellants rely are as follows:

1. The said court erred in affirming the decree of the United States District Court for the Eastern District of Oklahoma rendered in this cause, and in holding that the said United States District Court for the Eastern District of Oklahoma had jurisdiction to render its judgment in this cause, for the reason that the bill filed in this cause failed to contain any allegations sufficient to vest said District Court of the United States for the Eastern District of Oklahoma with jurisdiction to render a final decree herein, and for the reason that the record in this cause does not show that said District Court had jurisdiction thereof.

2. The said United States Circuit Court of Appeals for the Eighth Circuit erred in refusing to hold that the enrollment record of the person enrolled on the New Born Creek Indian roll opposite roll number 1287 as Cheparney Larney was conclusive of the fact that such person was the child of Big Jack, enrolled on the Creek Indian roll opposite roll number 8291, and Bettie, enrolled on the Creek Indian roll opposite roll number 8292.

3. The said United States Circuit Court of Appeals for the Eighth Circuit erred in holding that

the decision of the Commissioner to the Five Civilized Tribes in the matter of the enrollment of Cheparney Larney did not conclusively identify the person enrolled as Cheparney Larney upon the New Born Creek Indian roll opposite number 1287 as the child of Big Jack, enrolled on the Creek Indian roll opposite number 8291, and Bettie, enrolled on the Creek Indian roll opposite number 8292.

4. The said United States Circuit Court of Appeals for the Eighth Circuit erred in finding and holding that the appellee, Cheparney Larney, was the person enrolled by the Commissioner to the Five Civilized Tribes upon the New Born Creek Indian roll opposite roll number 1287.

ARGUMENT.

1. The decision of the Commissioner to the Five Civilized Tribes in enrolling Cheparney Larney and identifying him as the child of Big Jack and Bettie, enrolled opposite numbers 8291 and 8292, respectively, on the Creek roll, conclusively identifies the allottee as the child of these persons.

This court has so frequently had occasion to pass upon questions involving the treaties made by the Creek tribe of Indians with the United States that the history of the enrollment of these Indians by the Dawes Commission is doubtless well known. Under the Original Creek Agreement of March 1, 1901 (31 Statutes at Large 861, chapter 676, section 28), it was provided :

“All citizens who were living on the 1st day of April, 1899, entitled to be enrolled under section 21 of the Act of Congress approved June 28, 1908, entitled ‘An Act for the protection of the people of the Indian Territory, and for other purposes,’ shall be placed upon the rolls to be made by said Commission under said Act of Congress. * * *

“All children, born to citizens so entitled to enrollment up to and including the 1st day of July, 1900, and then living, shall be placed on the rolls made by said Commission. * * *

“The rolls so made by said Commission when approved by the Secretary of the Interior shall be the final rolls of citizenship of said

tribe upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

By the Supplemental Agreement with the Creek Indians (Act of June 30, 1902, 32 Statutes at Large, chapter 1323, sections 7 and 8), the class of children entitled to enrollment was enlarged to embrace those born to citizens entitled to enrollment under the Original Agreement subsequent to July 1, 1900, and up to and including May 25, 1901, if living upon the latter day, and also all those living May 25, 1901, born to citizens whose names appear upon the authenticated rolls of 1890 or 1895 and entitled to enrollment as provided by the Original Agreement. In short, the Supplemental Agreement provided for the enrollment of all children living May 25, 1901, regardless of the time of birth, provided they were born to citizens entitled to enrollment under the Original Agreement.

The Act of March 3, 1905 (33 Stat. at L. 1071), again enlarged the class of children entitled to enrollment, but in this act a more limited method of classifying those entitled to enrollment was followed than previously, for it did not include children born to citizens *entitled* to enrollment but only children born to citizens *whose enrollment had been approved* by the Secretary of the Interior prior to the approval of the act. It provided as follows:

"That the Commission to the Five Civilized Tribes is authorized for sixty days after the approval of this act to receive and consider applications for enrollments of children born subsequent to May 25, 1901, and prior to March 4, 1905, and living on said latter date, to citizens of the Creek tribe of Indians whose enrollment has been approved by the Secretary of the Interior prior to the date of the approval of this act; and to enroll and make allotments to such children."

Allotments of land were to be made to these new born children the same as to other citizens of the tribe. See:

Harris v. Bell, 254 U. S. 103, 65 L. ed. 159.

Cheparney Larney, the person enrolled and to whom the allotment of land was made which is involved in this case, was a child belonging to the class provided for by the Act of March 3, 1905, and was enrolled by the Commissioner pursuant to the power granted under that act. In the decision of the Commissioner (who, acting for the Secretary of the Interior, was the successor of the Dawes Commission; see *United States, ex rel. Lowe, v. Fisher*, 223 U. S. 95; *Martin v. United States*, 93 C. C. A. 484, 168 Fed. 198), enrolling Cheparney Larney, he found as follows:

"The evidence and the records of this office show that said Cheparney Larney is the child of Jacob Larney and Bettie Larney, whose names appear as Big Jack and Bettie on a

schedule of citizens by blood of the Creek Nation approved by the Secretary of the Interior March 28, 1902, opposite numbers 8291 and 8292, respectively." (Tr., p. 25.)

It is our contention that this finding of the Commissioner identifying the parents of Cheparney Larney as Big Jack, opposite roll number 8291, and Bettie, opposite roll number 8292, conclusively identifies the allottee, Cheparney Larney, as the child of the original defendants in this case, under whom appellants claim. This principle, it seems to us, must necessarily follow from a proper construction of the Act of March 3, 1905. It is clear that under that act the Commission was required to find four matters favorable to an applicant before it had authority to enroll: *First*, that the child was born subsequent to May 25, 1901; *second*, that the child was born prior to March 4, 1905; *third*, that the child was living on March 4, 1905; and *fourth*, that the child was born to citizens of the Creek tribe of Indians whose enrollment had been approved by the Secretary of the Interior prior to March 3, 1905. To this extent the Circuit Court of Appeals in its decision of this case agreed with us, for it held:

"It is apparent from the wording of the statute that the applicant, to be entitled to enrollment, must have been (1) born subsequent to May 25, 1901; (2) born prior to March 4, 1905; (3) living on March 4, 1905; (4) born to citizens of the Creek tribe whose enrollment had been approved by the Secretary of the In-

terior prior to March 3, 1905. The enrollment of the applicant, and especially when followed, as in the case at bar, by a certificate as to allotment and by allotment deeds or patents, would be conclusive that these four matters had been decided favorably to the applicant." (Tr., p. 53.)

But we further contend that the requirement which we have recited as the fourth requirement, *viz.*, that the applicant was born to citizens of the tribe whose enrollment had been approved by the Secretary of the Interior, necessarily required an identification of the parents of the child upon the approved tribal roll, and that a finding by the Commissioner identifying the parents upon the approved tribal roll was just as essential to the exercise of its jurisdiction in the matter as a finding that the child was born subsequent to May 25, 1901. To this extent the Circuit Court of Appeals differed with us, that court holding that the identification of the parents by the Commissioner upon the tribal rolls was not a material finding necessary to the exercise of the Commissioner's jurisdiction.

It is settled beyond controversy now that the Commission to the Five Civilized Tribes (and its successor, the Commissioner) was a quasi-judicial tribunal, empowered to determine who should be enrolled as citizens of those tribes, what land should be allotted to each, and in what way, and that its adjudication of those questions and of every issue

of law and fact which it was necessary for it to determine in order to decide them is conclusive and impervious to collateral attack.

—*United States v. Wildcat*, 244 U. S. 111, 61 Law. ed. 1024;

United States v. Atkins, 260 U. S. 220, 67 Law. ed. 95;

Malone v. Alderdice, 129 C. C. A. 204, 212 Fed. 668;

Nunn v. Hazelrigg, 132 C. C. A. 474, 216 Fed. 330;

Folk v. United States, 147 C. C. A. 183, 233 Fed. 177;

Kimberlin v. Commission to the Five Civilized Tribes, 44 C. C. A. 109, 104 Fed. 653.

In *United States v. Atkins*, *supra*, this court, quoting with approval from *United States v. Wildcat*, *supra*, said:

“There was thus constituted a quasi-judicial tribunal whose judgments, within the limits of its jurisdiction, were only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress by this legislation evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal land. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the Commission was es-

tablished and endowed with authority to hear and determine the matter.

“When the Commission proceeded in good faith to determine the matter and to act upon information before it, not arbitrarily, but according to its best judgment, we think it was the intention of the act that the matter upon the approval of the Secretary should be finally concluded and the rights of the parties forever settled, subject to such attacks as could successfully be made upon judgments of this character for fraud or mistake.”

In the case of *Nunn v. Hazelrigg, supra*, the Circuit Court of Appeals for the Eighth Circuit correctly, we think, laid down the rule as to what matters should be deemed conclusively settled by the adjudication of the Dawes Commission enrolling a citizen. It had before it in that case the question as to whether or not the enrollment of an Indian as an Indian by blood upon the Creek rolls was conclusive of the fact that such allottee was a mixed-blood Indian and not a freedman citizen, who, under the Act of April 21, 1904, were freed from restrictions against alienation. In discussing the question Judge SANBORN said:

“It (the Dawes Commission) was expressly required to make separate rolls of the Indians and freedmen. To be enrolled as a Creek Indian it was not sufficient for an applicant to show that he was an Indian, but himself show, and the Commission must find, that he was an Indian of the Creek tribe; and to be enrolled

as a freedman it was not sufficient to show that he was an African, but himself show, and the Commission must find, that he was a former slave or the descendant of a former slave of some member of the Creek tribe, or at least a slave of some other person adopted by the Creek Nation. It was, therefore, necessary for an applicant for enrollment to show upon what grounds he was entitled to such enrollment; that he was of Creek blood; that he was a Creek freedman, became a citizen of the tribe by the treaty of June 14, 1866; or that he had, without any such rights, become a member of the tribe by adoption. And when the Commission found by any one of these methods a person was entitled to enrollment, *the manner in which he was found to be entitled to such enrollment was adjudicated as much as the mere fact of the right of enrollment.*" (Italics ours.)

In *Malone v. Alderdice*, *supra*, the same court considered a contention that the recital of the age of a Creek allottee, prior to the Act of May 27, 1908, making such finding conclusive, was a conclusive adjudication by the Commission of that fact, and in discussing it, said:

"Upon these provisions of the Act of Congress counsel base the proposition that the adjudication of the age of each citizen, and especially of each minor, was indispensable to the decision of his claim to enrollment. The position is not without persuasive power when a general view of this legislation is taken, but when these statutes are analyzed and the real issue, the question whether or not it was essential to the

determination of the issue who should be enrolled that the Commission should adjudge when the minority of each minor would cease, is kept constantly in mind, the force of the argument disappears. The provision of the Act of June 28, 1898, that the Commission should make the rolls descriptive of the persons thereon so that they might be identified falls far short of granting jurisdiction to that Commission to adjudge conclusively on what day each minor on those rolls would attain his majority and thus to determine when he could buy, sell and convey property free from the disqualifications of his minority. * * * This was not the purpose or the effect of this provision of the Act of 1908. It was limited in object and in result to the making of a description of the persons enrolled for the purpose of their identification and not for the purpose of the final adjudication of the extent and limits of their disqualifications by reason of their respective ages or otherwise.

"It is true that it was necessary for the Commission to determine in making its rolls whether or not certain applicants were born before July 1, 1900, but that fact clearly gave it neither excuse nor power to adjudge the limits of the respective minorities of enrolled minors.

"It is also true that in making the allotments it was essential to the discharge of its duty that the Commission should decide at the time each citizen or freedman made his selection of his allotment, and also at the time he made his selection of his homestead, whether or not he was a minor in order to determine whether his selection must be made by himself or by

another. But it was also indispensable for it to determine at such times in each case and for the same reason whether or not the applicant was a prisoner, a convict, an incompetent, or an aged and infirm person. It was not, however, indispensable to the complete exercise by the Commission of its jurisdiction here, nor had it the power to determine how long after the selection of any minor, prisoner, convict, incompetent, or aged and infirm person his disability would continue, and there are two unanswerable reasons why the provisions of the Acts of Congress with reference to the allotments failed to give jurisdiction to the Commission conclusively to adjudicate by its enrollment of the citizens and freedmen of these tribes their respective ages and the time limits of the respective minorities of the minors. *First*, none of those provisions granted jurisdiction to the Commission in making the enrollment to adjudge the ages of the minors, nor was it necessary for that Commission in deciding who were citizens and freedmen to determine anything concerning their ages except that they were born before July 1, 1900; *second*, none of the provisions regarding the allotments required the Commission to do, or granted it the power to do, more regarding the ages of those enrolled than to determine at the times of his selections whether each allottee was then a minor or otherwise disqualified, and his requisition and power gave it no jurisdiction or authority to adjudge conclusively the extent or limits of their disqualification. And our conclusion is that the Commission to the Five Civilized Tribes had no jurisdiction in making its enrollment of their cit-

izens and freedmen to determine and conclusively adjudge their respective ages."

—*Malone, et al., v. Alderdice, et al., supra.*

Obviously, however, the reasons why the recital of age was not there regarded as a conclusive finding, is equally applicable here to show that the recital as to the parents of the person enrolled and their roll numbers is a conclusive finding. It was held in that case that the age of the person enrolled was not conclusive, because the Commission was not required to find that in the exercise of its jurisdiction. But here the Commission was required to find that the applicant's parents had been enrolled and their enrollment approved by the Secretary of the Interior in order to justify it in exercising its jurisdiction. And under the principles laid down in that case, if the finding was essential to the exercise of jurisdiction, it became an established fact which could not be collaterally attacked.

For instance, the adjudication that a citizen (other than new borns) was entitled to enrollment is conclusive of the fact that such citizen was living on April 1st, 1899.

— *United States v. Wildcat, supra;*

United States v. Atkins, (C. C. A.) 268 Fed. 823.

It is demonstrated by these decisions that the rule in determining whether or not the finding of the Commissioner was conclusive, is: Was such find-

ing essential or material to the exercise of its jurisdiction? If it were, the determination of the Commissioner is a conclusive judgment; if it were not, it has no force or effect.

In *Hegler v. Faulkner*, 153 U. S. 109, 38 Law. ed. 653, it was contended that a census prepared by an Indian Agent in ascertaining the number and names of the half-breeds entitled to participate in allotments to the Indians of the Iowa Tribe, was admissible for the purpose of showing the age of an Indian named George Washington, listed thereon, and this court in considering the matter said:

“Conclusiveness is a characteristic of the judgment of every tribunal acting judicially, whilst acting within the sphere of its jurisdiction, where no appellate tribunal is created. But such conclusiveness is restricted to those questions which are directly submitted for decision. In the case in hand, doubtless the identity of the half-breed, George Washington, and his right to receive the land in question as his share of the lands appropriated by the treaty, were finally found.”

Applying this rule to the present controversy the question resolves itself into this: Was the identification of the parents upon the rolls of the tribe essential to the exercise of the Commissioner's jurisdiction in enrolling Cheparney Larney?

As we have shown, the Act of March 3, 1905, limited the Commissioner in enrolling new born chil-

dren to such only as were children of parents whose enrollment had theretofore been approved by the Secretary of the Interior. Obviously, in order to determine whether or not Cheparney Larney was the child of persons whose enrollment had been approved, the Commissioner necessarily was obliged to identify upon the approved rolls of the Tribe the parents of Cheparney Larney before he could exercise this jurisdiction. For it is clear that he could not determine whether or not Cheparney Larney's parents had been enrolled unless he first determined not only who Cheparney Larney's parents were but under what names and opposite what numbers upon the Tribal roll they appeared. We do not believe the illustration used by the honorable judge who wrote the opinion in the case in the Circuit Court of Appeals to refute this is based upon a correct reason. He illustrates his position by assuming there had been an actual pending controversy as to whether the child was the child of Jacob Larney and wife or of Big Jack and wife, and says that since the enrollment of all these four people had been approved by the Secretary of the Interior the Commissioner would not have been called upon to decide the dispute as to parentage. It seems to us, however, that under such circumstance the Commissioner before he could lawfully exercise his authority to enroll the child would have been required to decide who its parents were. For if there were a dispute as to parentage, the Commissioner could not

determine that the child's parents had been enrolled until he first decided the dispute. It seems to us it would not have been sufficient for him to have decided that the parents might have been Jacob Larn-ey and wife or Big Jack and wife, for that would have been equivalent to a decision that the Commissioner did not know who the parents of the child were. If the Commissioner did not know which of two couples were the parents of the child, it must logically follow that the Commissioner did not know the parents of the child. For if he were not clear that the child was the offspring of the one or the other couple, he could not possibly have known that it was the child of one or the other. The Act required the Commissioner, before enrolling the child, to ascertain the fact that its parents' enrollment had been approved by the Secretary of the Interior prior to March 3, 1905. If the Commissioner had merely ascertained that the child was probably the offspring of one or two couples without ascertaining which couple were the parents, it seems to us that the Commissioner would have failed to perform the duties required of him by the Act. Such a latitude of power was not permitted him under the Act. It might as well be said that the Commissioner could exercise his jurisdiction by merely determining that an applicant for enrollment was the child of someone, without ascertaining which one, however, enrolled upon the approved tribal rolls.

It is evident from a consideration of the various enrollment Acts that the class of new born children permitted by the Acts to be enrolled was narrowed down and restricted by this Act of 1905 to a very limited class, and that the power given to the Commissioner by this Act to add additional persons to the tribal rolls with a view to participation in the division of the lands of the nation was of a very limited character. It being a limited jurisdiction, it must follow that it was necessary for him to strictly comply with the terms upon which it could be exercised. It seems to us that it was never contemplated that he might determine that an applicant's parents were enrolled without first definitely ascertaining and determining who the applicant's parents were and definitely and clearly identifying those parents upon the approved tribal rolls. In other words, it was requisite that he be able to point out the name and roll number of the parent upon the approved tribal roll in order to exercise this power of adding to the rolls.

This evidently was the construction placed upon the Act by the Commissioner at the time, for he did identify the parents of Cheparney Larney by their names and roll numbers upon the approved rolls of the tribe. He identified them beyond controversy as the defendants below in this case, Big Jack and Bettie, both by name and by giving their roll numbers. It seems to us that if in his decision

there were any conflict between the identification of the parents upon the tribal roll and the identification of the parents under other names by which they might have been known, the finding identifying them upon the tribal roll should be conclusive as to their identification, for that was the material finding essential to the exercise of the jurisdiction conferred, whereas, the finding as to the other names by which the parents might have been known was an immaterial, non-essential finding.

If we are correct in this position, then the decree below should have been reversed, because the Commissioner in his decision in enrolling Cheparney Larney identified the name and roll number of the parents of Cheparney as Big Jack and Bettie, who the record shows were the persons under whom appellants claim,—the appellee conceding that he was not their child.

Both the appellee and the child of Big Jack and Bettie are shown by the evidence in this case to have been entitled to enrollment under the Act of March 3, 1905. One of them was enrolled as Cheparney Larney. One of them, apparently, was not enrolled. If we are correct in the propositions of law which we have heretofore advanced, the court should have determined that the decision of the Commissioner conclusively identified the one enrolled as the child of Big Jack and Bettie. For the parents of the appellee were enrolled under the names of

Jacob Tiger and Lucy Green, opposite roll numbers 7868 and 8361, and could not, therefore, have been the persons whom the Commissioner identified as the parents of Cheparney Larney whom he enrolled.

It is conceded by all the evidence in this case that Big Jack and Bettie did have a child about the age of the child enrolled as Cheparney Larney. It was the plaintiff's claim that this child was named Okseetka, and they showed that a citizen of Hilla-bee Town named William Barnett gave the Commissioner information to the effect that Big Jack had two boys who had not been enrolled, naming them as Okchumpulla and Okseetka. Okchumpulla was enrolled. (See decision, Tr., p. 31.) Okseetka was denied enrollment for the sole reason that the Commissioner found no evidence to show when he was born, whether prior to or subsequent to March 4, 1906 (See decision, Tr., p. 33). Now the child enrolled as Cheparney Larney was merely referred to by the field clerk who reported the existence of such a child as the child of Jacob Larney and Bettie Larney, whose name could not be ascertained. (Tr., p. 24.) The Commissioner therefore said in his decision:

“Reference to said person will hereinafter be made under the name of Cheparney Larney, the Creek word ‘Cheparney’ signifying ‘little boy’.”

The denial of the application of William Barnett to enroll Okseetka was not a finding that such child was not entitled to enrollment, but merely a finding that there was not sufficient evidence before the Commission as to the date of the child's birth to authorize enrollment. It is entirely possible that such child was the child named by the Commissioner as Cheparney Larney and that the Commissioner failed to connect the child named by William Barnett as Okseetka with the child about whom information was given by Alex Posey. It is, however, beyond dispute that Big Jack and Bettie did have a child about the age of the child enrolled as Cheparney Larney and that such child was entitled to enrollment under the Act of March 3, 1905.

The evidence in this record shows that the mother of the plaintiff, or appellee, was enrolled as Lucy Green and known as Petey, whereas, the undisputed evidence showed that Bettie, the wife of Big Jack, was known as Bettie Larney. If it can be supposed that the Commissioner knew that Jacob Larney, of Tulla·legee Town, was Jacob Tiger (as contended by appellee), then it must be presumed that the Commissioner must have procured information from some source that Jacob Larney was not the husband of Bettie Larney and that Bettie Larney's husband was Big Jack, and, therefore, must have identified the child as the child of Bettie Larney whose husband was Big Jack and not Jacob Tiger. As stated

by this court in the case of *United States v. Wildcat, supra*, it was the practice of the Commission to make inquiries and investigations and to ascertain the facts as to persons enrolled, and that it was the practice to enroll no person without information that was deemed satisfactory at the time. As said by the court in that case:

"It is true that the methods followed by the Commission may not have been the most satisfactory possible of determining who were entitled to enrollment as living persons on April 1st, 1899, but it must be remembered that there were many persons whose right to enrollment was being considered and the Commission in good faith made an honest endeavor to keep the names of persons off the rolls who were not entitled to appear as members of the tribe upon the date fixed by Congress."

We respectfully submit that it should have been decreed in this cause that the Commissioner's decision enrolling Cheparney Larney conclusively identified him as the child of Big Jack and Bettie, and that the trial court and the Circuit Court of Appeals erred in decreeing that the appellee was the person enrolled to whom the lands involved were allotted.

2. Did the trial court have jurisdiction of this cause?

In the trial court the question of jurisdiction was not directly raised, but it was assigned as er-

ror in the Circuit Court of Appeals. (See Tr., p. 44.) In the bill filed in this cause it is alleged that the plaintiff was a citizen of the Eastern District of the State of Oklahoma and that the defendants were citizens and residents of the Eastern District of Oklahoma. (Tr., pp. 1 and 2.) Jurisdiction was not invoked, therefore, because of diversity of citizenship.

The only reference in the bill to any Act of Congress or treaty of the United States is a general allegation that plaintiff went into possession of the lands described "by authority of the several treaties between the Creek Nation and the Government of the United States and the laws of Congress that have been enacted dealing with the lands and individuals of the Creek Nation, soon after said allotment was made, and has since been in open, notorious and peaceable possession of the same since the time of receiving his allotment patents from the Creek Nation." (Tr., p. 2.) The controversy, as shown by the allegations of the bill, which caused the litigation was whether or not plaintiff was the person enrolled as Cheparney Larney or whether such person was the deceased child of defendants, Big Jack and Bettie. No allegation is contained in the bill that in enrolling Cheparney Larney the Commissioner to the Five Civilized Tribes identified him as the child of Big Jack and Bettie upon the approved rolls of the Creek Nation. So far as the bill

shows, therefore, the issue was purely an issue of fact as between plaintiff and the defendants and did not show that the meaning or effect of any Act of Congress or treaty of the United States was involved in the determination of the action.

The Circuit Court of Appeals in its decision of this case held that the averments of the complaint were not sufficient to show jurisdiction. In this the court was unquestionably correct, for it is well settled that the federal question must appear, not by mere inference, but by distinct averments, according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts averred must show not as a matter of mere inference or argument, but clearly and distinctly that the suit arises under some federal law.

—*Hanford v. Davies*, 163 U. S. 273, 41 Law. ed. 157;

Hull v. Burr, 234 U. S. 712, 58 Law. ed. 1557.

The mere fact that title was derived from the United States does not give the federal court jurisdiction unless the controversy involves the construction, meaning or effect of the granting Acts.

—*Joy v. St. Louis*, 201 U. S. 332, 50 Law. ed. 776.

But the Circuit Court of Appeals held that where the jurisdiction was not challenged by pleading, but the question is raised for the first time in

the appellate court, jurisdiction sufficiently appears if it is shown in any part of the record, including the proofs; and applying this rule to the present case, held that it sufficiently appeared from the pleadings and proofs in this record that the construction of the Act of March 3, 1905, was necessarily involved in the case. This court has announced the rule to be, forbearance of the parties or consent that the case be considered upon its merits does not and should not prevent this court from examining and determining the question whether or not the court whose judgment has been brought here for review had or had not jurisdiction.

—*Metcalf v. The City of Watertown*, 128 U. S. 586, 32 Law. ed. 543.

We believe that the Circuit Court of Appeals was wrong in holding that in this character of cases where jurisdiction is attempted to be invoked solely upon the ground that a federal question is involved that the appellate court can look to the entire record to see whether or not the meaning or effect of an Act of Congress was involved in the case. There is a distinction between cases where jurisdiction is based upon diversity of citizenship and those in which jurisdiction is based upon the fact that the cause arises out of a federal law, in this, that in the latter class of cases it must appear at the outset from the declaration or the bill of the

party suing that the suit is one pending upon some question of a federal nature.

—*Metcalf v. The City of Watertown, supra, Florida etc., R. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486;

Tennessee v. Union & P. Bank, 152 U. S. 454, 38 L. ed. 511;

Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205.

The question of jurisdiction in such cases must be determined from the complainant's statement of his own cause of action as set forth in the bill, without regard to any questions that might have been brought into the suit by the answers or in the course of the subsequent proceeding. See authorities above cited, and

Flanders v. Coleman, 250 U. S. 223, 63 L. ed. 948.

As said by this court in *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 57 L. ed. 716, 717:

“Of course, the party who brings the suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a ‘suit arising under’ the patent or other law of the United States by his declaration or bill. That question cannot depend upon the answer, and accordingly jurisdiction cannot be conferred by the defense, even when anticipated and replied to in the bill. * * * Conversely, when the plaintiff bases his cause of action upon an Act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim.”

If jurisdiction because the suit is based upon a federal statute can only be determined from the allegations of the bill, cannot be conferred by the allegations of the answer, nor even by anticipating the defense in the bill, we do not understand how jurisdiction based upon the construction of a federal Act can be upheld by looking to other parts of the record other than the bill. If we are correct in this, the Circuit Court of Appeals erred in holding that the trial court had jurisdiction of this cause, and if it did not have jurisdiction then the decision below should be reversed and the bill ordered dismissed.

—*Mansfield etc., R. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 465.

If the court below had jurisdiction, we believe its decree in favor of appellee should be reversed and a decree rendered in favor of appellants. If it did not have jurisdiction, then the decree should be reversed and the suit ordered dismissed.

Respectfully submitted,

NATHAN A. GIBSON,
JOSEPH L. HULL,
THOMAS L. GIBSON,
GLENN R. HORNER,
Solicitors for Appellants.



DEC 1 1923

WM. R. STANSBURY
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No. [REDACTED] 146

In the
Supreme Court of the United States.
October Term, 1923.

L. B. NORTON, BETTIE, KIZZIE GOUGE, OK-
CHUMPULLA, *ET AL.*, *Appellants,*

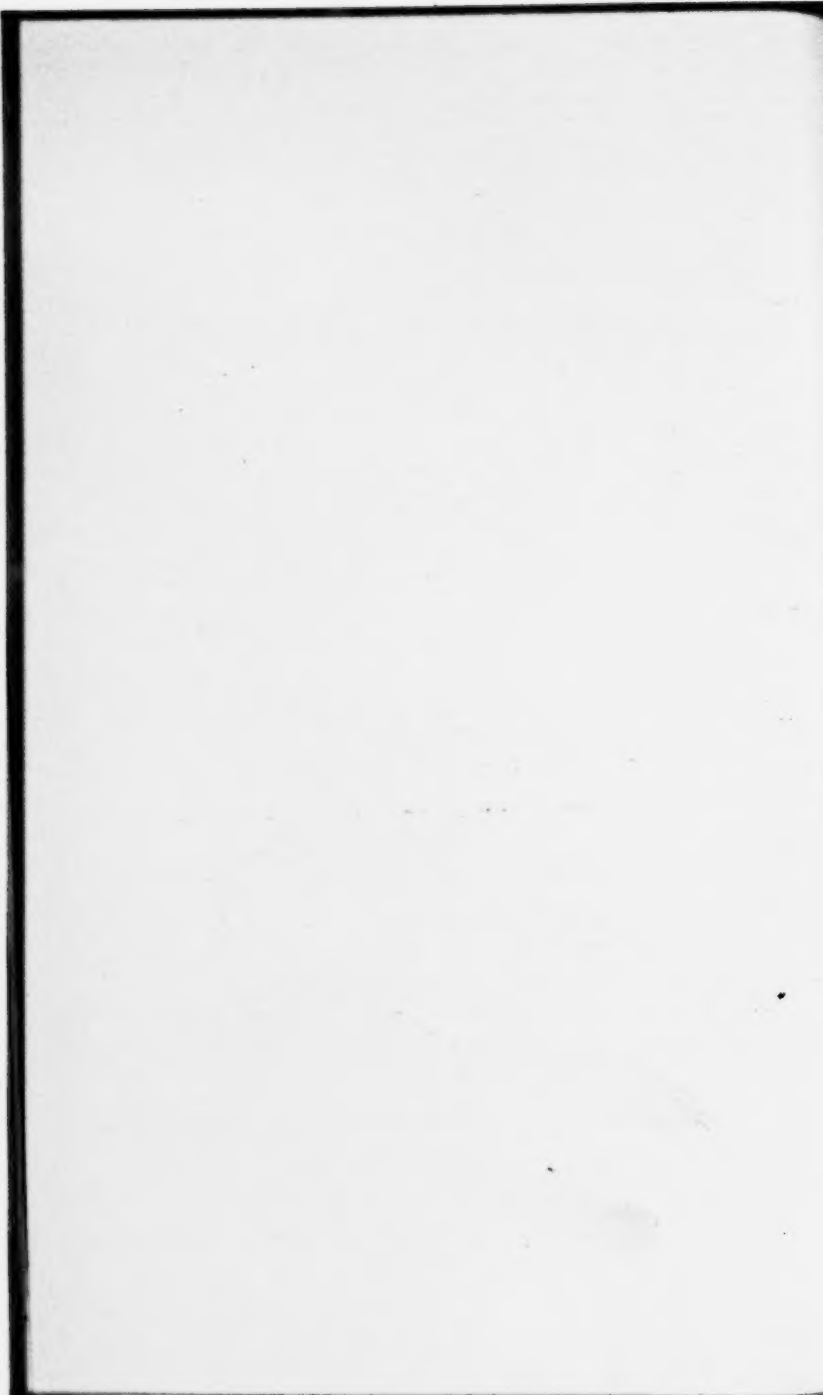
VERSUS

CHEPARNEY LARNEY, A MINOR, AND BENNIE
GREEN, HIS LEGAL GUARDIAN, *Appellees.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEES.

ELIAS J. VANCOURT,
CLARK NICHOLS,
HORACE D. REUBELT,
Counsel for Appellees.



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IN THE
SUPREME COURT OF THE UNITED STATES.
October Term, 1923.

No. 494.

L. B. NORTON, BETTIE, KIZZIE GOUGE, OK-
CHUMPULLA, *ET AL.*, *Appellants*,

vs.

CHEPARNEY LARNEY, A MINOR, AND BENNIE
GREEN, HIS LEGAL GUARDIAN, *Appellees*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *on BEHALF of APPELLEES.*

Statement of the Case.

This case presents for determination a question of the identity of a certain full-blood Creek Indian known as Cheparney Larney, enrolled on the New Born Creek Tribal Roll, No. N. B. C. 1287, under the Act of March the 3rd, 1905, (33 Stat. L. 1060).

Appellants claim that the Indian enrolled as Cheparney Larney and whose name appears on said New Born Creek Rolls, was the deceased child of "Big Jack", enrolled as a full-blood Creek Indian on the Creek Tribal Rolls, opposite Roll No. 8291, and Bettie who is enrolled as a full-blood Creek Indian on the Creek Tribal Rolls, opposite Roll No. 8292.

Appellee claims to be the Indian, Cheparney Larney, enrolled as a New Born Creek opposite Roll No. N. B. C. 1287, that his father was Jacob Larney, also known as Jacob Tiger, enrolled as a full-blood Creek Indian on the Creek Tribal Rolls, opposite Roll No. 7968, and that his mother is Pettie Larney, enrolled as Lucy Green on the Creek Tribal Rolls as a full-blood Creek Indian opposite Roll No. 8631.

ARGUMENT.

Appellants in their brief argue two propositions as follows, to-wit:

1. The decision of the Commissioner to the Five Civilized Tribes in enrolling Cheparney Larney and identifying him as the child of Big Jack and Bettie, enrolled opposite numbers 8291 and 8292, respectively, on the Creek Roll, conclusively identifies the allottee as the child of these persons.

2. Did the trial court have jurisdiction of this cause?

I.

The decision of the Commissioner to the Five Civilized Tribes in enrolling Cheparney Larney and identifying him as the child of Big Jack and Bettie, enrolled opposite numbers 8291 and 8292, respectively, on the Creek Roll, conclusively identifies the allottee as the child of these persons.

The land in question was an allotment pursuant to Act of Congress of March the 3rd, 1905, (31 Stat. 1071); made to a citizen of the Creek Tribe of Indians named in the deeds as Cheparney Larney.

It is the claim of appellants that the person who was enrolled was a son of "Big Jack" one of the original defendants; that the son died about November, 1906, and that appellants succeeded to the rights of said deceased son in the allotted land.

It is the claim of appellee that he is the person who was enrolled as a full-blood Indian on the Creek Tribal Rolls, opposite Roll No. 1287, and that he thereby became entitled to and received as his allotment the land in question. The Act of March the 3rd, 1905, provides:

"That the Commission to the Five Civilized Tribes is authorized for sixty days after the approval of this act to receive and consider applications for enrollments of children born subsequent to May 25, 1901, and prior to March 4, 1905, and living on said latter date, to citizens of the Creek Tribe of Indians whose enrollment has been approved by the Secretary of the Interior prior to the date of the approval of this act; and to enroll and make allotments to such children."

The vital question in this case is therefore one of identity, and it involves said statute under which the Commissioner was acting and the construction of the decision of the Commissioner to the Five Civilized Tribes granting and ordering the enrollment involved. The decision of the Commissioner is as follows:

"Department of the Interior. Commissioner to the Five Civilized Tribes. In the matter of the application for the enrollment of Cheparney Larney as a citizen by blood of the Creek Nation.

"DECISION.

"It appears from the records of this office that on April 24, 1905, testimony was offered

'in the matter of the application for the enrollment of certain new borns, as citizens of the Creek Nation,' which embraced a child of Jacob Larney (or Green) and Bettie Larney (or Green), which is herein considered as an original application for the enrollment of said person as a citizen by blood of the Creek Nation. Further proceedings were had February 16, 1907.

"It appears from the testimony that about July 19, 1905, a Creek field party went to the home of said child for the purpose of obtaining information with reference to the right to enrollment of said child, and that the parents refused to give such information, because of the influence over them of the Snake or disaffected faction of the Creeks; that the clerk in charge is under the impression that said child is a male, but states that he could not learn the name of said child. In view of the fact that the full name of said child could not be ascertained, and that it is believed that said child is a male, reference to said person will hereinafter be made under the name of Cheparney Larney, the Creek word 'Cheparney' signifying 'little boy.'

"The evidence and the records of this office show that said Cheparney Larney is the child of Jacob Larney and Bettie Larney, whose names appear as 'big Jack' and 'Bettie' on a schedule of citizens by blood of the Creek Nation, approved by the Secretary of the Interior March 28, 1902, opposite Nos. 8291 and 8292, respectively. The evidence shows that about July 19, 1905, said Cheparney Larney appeared to be about one year old.

"Although the evidence herein is not as

full and complete as has heretofore been required by this office to establish the right of a person to be enrolled as a citizen of the Creek Nation, in view of the provisions of the Act of Congress approved April 26, 1906 (34 Stat. 137), fixing March 4, 1907, as the date after which the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person as a citizen of said Nation, it is believed that the evidence herein should be considered sufficient to establish the facts necessary to enrollment.

"It is therefore ordered and adjudged that said Cheparney Larney is entitled to be enrolled as a citizen by blood of the Creek Nation, under the provisions of the Act of Congress approved March 3, 1905 (33 Stat. 1048), and the application for his enrollment as such is accordingly granted.

"Tams Bixby, Commissioner.

"Muskogee, Indian Territory, February 23, 1907."

In determining the identity of the allottee it should be borne in mind that Congress authorized the Dawes Commission to receive and consider applications for enrollments of children born subsequent to May the 25th, 1901, and prior to March 4, 1905, and living on said latter date, etc.

Our position is that the application for enrollment received and considered by the Dawes Commission is jurisdictional and determines the identity of the person enrolled. This principle was settled in the case of *Porter v. U. S.*, (C. C. A.) 260 Fed. 1. In that

case the Commission had described the person enrolled as the child of Jennie McGilbra, whereas, the mother of such person was in fact Lizzie McGilbra. It was held that this error in the matter of parentage was immaterial and that the person enrolled by the Commission was the same person whose name appeared on the 1895 Roll as Lettie McGilbra. The court in that opinion, says:

“Having concluded that the name Lettie McGilbra as it appeared upon the original 1895 Tribal Roll represented not Nellie Porter, nor Nellie Deer, nor Nellie McGilbra, but Lettie McGilbra, an entirely different person, the appearance of that name on the 1895 Tribal Roll under the circumstances of this case must be treated in contemplation of law as the application of Lettie McGilbra for enrollment by the Dawes Commission. They entertained that application when they transferred the name to the census card. They then, pursuant to such application, proceeded to investigate her right to enrollment. However misleading or however far from the truth may have been the information secured in the course of such investigation, still the person whose right to enrollment was being investigated was the individual represented by the name on the Tribal Roll. She was the applicant. This applicant was Lettie McGilbra. The Commission acted favorably on said application and enrolled the applicant. It follows that this name on the approved Roll represents not Nellie Porter, nor Nellie Deer, but Lettie McGilbra, deceased, daughter of Lizzie McGilbra. Involved in this enrollment is the conclusive finding by the Dawes Commission that Lettie

McGilbra was a duly and legally enrolled member of the Creek Tribe in 1895, and who was living April 1, 1899."

Thus, it is decided that the name of Lettie McGilbra on the 1895 Tribal Roll treated in contemplation of law as the application of Lettie McGilbra for enrollment by the Dawes Commission is the fact that conferred jurisdiction on the Commission to enroll that person. That when the Dawes Commission transferred the name to the census card they entertained that application. That the appearance of that name on the 1895 Tribal Roll and the transfer thereof to the census card were conclusive of the fact that the person whose name appeared on the 1895 Roll was the identical person enrolled. They obtained jurisdiction of the person for whom application had been made and enrolled that identical person.

The Commissioner on February the 23rd, 1906, rendered his "decision" in the matter of the application for the enrollment of Cheparney Larney. The finding of the Commissioner, material to this case, is as follows:

"It appears from the records of this office that on April the 24th, 1905, testimony was offered in the matter of the application of the enrollment of certain New Borns as citizens of the Creek Nation, which embraced a child of Jacob Larney (or Green) and Bettie Larney (or Green), which is herein considered as an original application for the enrollment of said person as a citizen by blood of the Creek Nation."

The testimony of April the 24th, 1905, considered as an original application by the Commissioner is as follows:

"Jacob Larney (or Green), Arbeka Tulledega Town, Bettie Larney (or Green), Hillabee Town have a child. Postoffice, Hanna, Indian Territory." (I., p. 22.)

When Alex Posey, who was then engaged in the field for the Dawes Commission securing evidence about Creek citizens and New Borns gave the testimony as hereinbefore set out and when said testimony was considered by the Commissioner as the original application for the enrollment of a certain New Born Creek Indian child called by the Commission itself, Cheparney Larney, the said person whose right to enrollment was being investigated was the individual whose name appeared in the original application for enrollment made by Alex Posey. The application was made for a child whose father was Jacob Larney (or Green), Arbeka Tulledega Town, and whose mother was Bettie Larney (or Green), Hillabee Town. The evidence shows that the father of appellee was Jacob Larney enrolled as Jacob Tiger on the Creek Tribal Rolls, opposite Roll No. 7968, and that his mother Pettie Larney, called by Alex Posey in the application for enrollment Bettie Larney, was enrolled as Lucy Green, opposite Roll No. 8361, and the enrollments of Jacob Tiger and Lucy Green, were approved by the Secretary of the Interior prior to the date of the

approval of the Act of March the 3rd, 1905. It is shown by Exhibit No. 15, that Jacob Tiger was a member of Tulledega Town and by plaintiff's Exhibit No. 14, that Lucy Green was a member of Hillabee Town, and plaintiff's Exhibit No. 13, shows that Big Jack was a member of Hillabee Canadian Town, and that Bettie his wife was a member of Hillabee Canadian Town.

The principle announced in the case of *Porter v. U. S.*, (C. C. A.) 260 Fed. 1, is identical with the principle involved here. When an application for enrollment of a certain child was made and the Commission entertained that application and thereon rendered its judgment enrolling the person for whom application had been made, that judgment became final and conclusive as to the identity of the person enrolled. When Alex Posey acting for the Dawes Commission went into the field to look up Indian children entitled to enrollment under the Act of March 3, 1905, and found a particular child entitled to enrollment and made application for the enrollment of said child he became the agent of the said child for that purpose. And the application for the enrollment of said child filed by Alex Posey became, in law, the application of said child just as much so as if the child itself had made the application. The Circuit Court of Appeals, in affirming the *Porter* case, quotes with approval from Judge CAMPBELL's opinion:

“I cannot accept this contention as sound—the appearance of that name on the 1895 Tribal Roll under the circumstances of this case must be treated in contemplation of law as the application of Lettie McGilbra for enrollment by the Dawes Commission. They entertained that application when they transferred the name to the census card. They then, pursuant to such application, proceeded to investigate her right to enrollment. However misleading or however far from the truth may have been the information secured in the course of such investigation, still the person whose right to enrollment was being investigated, was the individual represented by the name on the Tribal Roll. * * * The Commission acted favorably on said application and enrolled the applicant.”

We believe that the doctrine of the *Porter* case settles the issue of this suit.

That in regard to the identity of the person enrolled there is neither doubt nor ambiguity, but that it is perfectly clear and conclusive that the child for whom application was made is the identical child enrolled.

But the trial court held that there was an ambiguity in the record concerning the parentage of the child enrolled and decided in favor of appellee. The parol evidence introduced upon this question undoubtedly supports the finding of the court. In regard to the children of Big Jack or Jackey Thlocco and Bettie Jack or Thlocco the evidence shows that they had three sons: Tecumseh, Okchumpulla and a

younger boy. Witnesses for both parties testified at the trial that these Indians had three sons.

Big Jack, testified: "When Alex Posey was in that country trying to find New Born Creeks I had three boys." (Tr., p. 19.)

J. H. Hill, testified: "I only knew two of his boys: Tecumseh and Okchumpulla. I did not know the other boy, but heard that there was a boy by the name of Okseetka." (Tr., p. 13.)

Joseph Pigeon, testified: "I know Tecumseh, he is Big Jack's son. Big Jack had another boy besides Okchumpulla and Tecumseh, whose name was Okseetka." (Tr., p. 14.)

Thomas Red, witness for appellant testified: "I am well acquainted with Big Jack and his wife, Bettie. I got acquainted with them a little before the Civil War. I now live about two miles from them and lived at the same place at time of enrollment. Big Jack lived at the same place. I know their children. They had three boys." (Tr., p. 16.)

George Simmons, witness for appellant, testified: "I know the defendants Big Jack and Bettie. Have known them for twenty-six years. I live six miles from them. I know their children. They had three boys." (Tr., p. 17.)

Cutsee Harjo, witness for appellant, testified: "I know the defendants Big Jack and Bettie. Have known them since the close of the Civil War. I live

near them. I know their children. They had three boys." (Tr., pp. 17-18.)

It is shown by the record evidence of the Dawes Commission that two of the boys of Big Jack and Bettie were enrolled by the Commissioner and that the application for the enrollment of a third boy was dismissed. The enrollment of Tecumseh, one of the sons of Big Jack and Bettie is shown by appellee's Exhibit 13 found opposite page 38, of the transcript. The enrollment of Okchumpulla is shown by plaintiff's Exhibit 6, opposite page 34, of the transcript. The application for enrollment of Okseetka the youngest son of Big Jack and Bettie is shown to have been dismissed by the Commission by Exhibit 5, page 33 of the transcript.

Thus, it is conclusively shown by the evidence, both record and parol, that Big Jack and Bettie had three sons. It is shown by the record evidence that three boys of Big Jack and Bettie are accounted for in the matter of enrollment. Two were enrolled and the application for enrollment of the third boy was dismissed. No other application for enrollment of a boy of Big Jack and Bettie was made.

In this connection, we call the court's attention to the evidence of Alex Posey, the person who filed the application for the enrollment of the child of Jacob Larney and Bettie Larney, given February the 16th, 1907, which is a part of the enrollment record in this case and appears at page 24 of the transcript, the material part of which is as follows:

Q. "What is your name, age and postoffice address?

A. Alex Posey, age 33, Muskogee.

Q. Did you on July 19, 1905, go to the home of Jacob and Bettie Larney, for the purpose of obtaining information with reference to a child of theirs.

A. Yes, sir.

Q. Was that child a boy or girl?

A. I am under the impression he was a boy.

Q. What is your best opinion with reference to the age of that child?

A. The child appeared at that time to be about a year old.

Q. The parents of that child refused to give any information concerning that child?

A. They wouldn't give any information whatever.

Q. Do you know whether they are members of the Snake or disaffected faction of Creeks?

A. The father of the child's mother very much opposed the work of this Commission.

Q. Do you know if the child is now living?

A. I made inquiries about this child a short time ago and I am informed that the child is still living."

For the purpose of determining what woman was referred to by Alex Posey in his testimony, which was taken as the application for the enrollment of a young child, we call attention to the fact that he stated that the father of the child's mother very much opposed the work of this Commission. Now, in connection with that statement made by

Alex Posey, we call attention to the evidence given at the trial in the United States District Court by Bennie or Ben Green, as shown on page 10 of the transcript, and is as follows:

"I knew a man in that neighborhood by the name of Jacob Larney or Jacob Tiger. I knew a woman by the name of Petey, or Petey Larney, she was my daughter. Jacob Larney was her husband. They had three children born to them. Their names was Chebon Larney, Joe Larney and one died an infant without name, Joe Larney and Cheparney Larney are now living. I am guardian for both of them."

And later in his evidence he says:

"I knew an Indian named Alex Posey. I saw him in my neighborhood about the time Cheparney Larney was about a year old. At that time I was a member of a group of Indians opposed to the work of the Dawes Commission who were trying to allot the land."

In this connection we call attention to the evidence given at the trial by Bettie, the wife of Big Jack, as shown on page 19, of the transcript:

"My name is Bettie. I am the wife of Big Jack, when I was a girl I was called Bettie Larney. My father and my mother died before I knew them."

Thus, it is conclusively shown by the evidence that the mother of the child Cheparney Larney had a living father who was opposed to the work of the Dawes Commission. Bettie the wife of Big Jack had

never known her father. Bennie Green the father of the mother of appellee was opposed to the work of the Dawes Commission. The mother of the child for whom Alex Posey made application could not have been Bettie, the wife of Big Jack, but the daughter of Bennie Green was the mother of that child and the wife of Jacob Larney the father of said child.

We think it is conclusively shown that appellee was the identical child enrolled and if it may be said that an ambiguity exists in the record it is in the matter of parentage alone.

After hearing the evidence the trial court concluded, as follows:

“The Court: The question of the validity of the judgment of the Dawes Commission is not involved. The question before this court is whether the plaintiff who sues through his guardian in this case and who has been known by the name of Cheparney Larney is the identical person who was enrolled by the Commission to the Five Civilized Tribes as the son of Jacob Larney, Roll number ... and of Peetie Larney, Roll number ... as contended on the part of plaintiff.

“The record shows that Big Jack is enrolled under the Creek Dawes Roll number 8291 and Bettie, wife of Big Jack, appears opposite the Dawes Roll number 8292. The question here presented is as to an ambiguity in the record. The entire record of the enrollment comes up for the consideration of the court, not only the certificate of the enrollment by the record includ-

ing the application and the evidence. That is the way I understand the law. Now application is made on April 24th, 1905, by Alex Posey who presented to the Commission a list of children for whom application could not be made theretofore and he made the application as follows: 'the child of Jacob Larney (or Green), Arbeka Tulledega Town, Bettie Larney (or Green), Hillabee Town.' Now Jacob Larney who is enrolled as Jacob Tiger was from Arbeka Tulledega Town and Lucy Green, I believe that is her name, being the name by which she is enrolled being also known as Bettie Green and as Peetie Larney appears to be the mother of the plaintiff, Cheparney Larney. Now Big Jack was not from Arbeka Tulledega Town. I believe from this evidence that this child, Okseetka, is the child that the defendants' witnesses referred to. I can't believe the defendants' witnesses who testified that Big Jack had a child a year or two or three years old and that prior to enrollment, prior to the time Alex Posey went down in that community he was called Cheparney Larney. This record undisputably shows that the Commission to the Five Civilized Tribes gave him that name and it is unreasonable evidence when it shows that prior to that time he was called in that community by the name that the Dawes Commission afterwards arbitrarily gave him. Now these old Indians, I don't find they committed perjury. This has been a long time and my experience as a lawyer tells me about matters remote that the recollection of witnesses is easily and erroneously refreshed sometimes as to remote matters. So I find generally in favor of plaintiff and a decree will be entered by this court removing the cloud from the title." (Tr., pp. 20-21.)

We think that there can be no serious controversy as to the identity of the child enrolled; that in that respect the judgment of the Dawes Commission is clear, unambiguous and conclusive. That the opportunity of controversy is found in that portion of the "decision" of the Dawes Commission when it mentions the parents of the child for whom application had been made, as follows, to-wit:

"The evidence and the records of this office show that said Cheparney Larney is the child of Jacob Larney and Bettie Larney, whose names appear as 'Big Jack' and 'Bettie' on a schedule of citizens by blood of the Creek Nation, approved by the Secretary of the Interior March the 28th, 1902, opposite Nos. 8291 and 8292, respectively."

We think that the fact that in said record Jacob Larney was confused with Big Jack and Bettie Larney was confused with Bettie does not affect the conclusive finding that a child of Jacob Larney and Bettie Larney for whom application had been made was in fact enrolled. In discussing this question and the authorities cited the Circuit Court of Appeals (289 Fed. p. 395) says:

"It is apparent from the wording of the statute that the applicant to be entitled to enrollment, must have been (1) born subsequent to May 25, 1901; (2) born prior to March 4, 1905; (3) living on March 4, 1905; (4) born to citizens of the Creek Tribe whose enrollment had been approved by the Secretary of the In-

terior prior to March 3, 1905. The enrollment of the applicant, and especially, when followed, as in the case at bar, by a certificate as to allotment and by allotment deeds or patents, would be conclusive that these four matters had been decided favorably to the applicant. Cases, *supra*.

"But any findings or recitals on matters other than these, for example, the exact age of the applicant, as in *Malone v. Alderdice*; or the exact names of the parents, as in *Porter v. U. S.*; or the marital relationship of the applicant, as in *U. S. v. Lena*—would not be of binding or conclusive effect, because they were not required to be found, either by the statute or as the necessary basis for the decision; and for like reason a finding as to the sex of the applicant, or as to the enrollment numbers of the parents of the applicant, or their aliases, would not be conclusive. Such matters might be stated as aids to identify the applicant, but mistakes in such statements would not affect the validity of the patent, nor prevent the applicant from proving his identity. The two classes of findings must not be confused.

"In the decision of the Commissioner there is a recital that the applicant was a child of Jacob Larney (or Green) and Bettie Larney (or Green). There is also a finding that, about July 19, 1905, the applicant appeared to be about one year old. This was equivalent to findings that the applicant was born subsequent to May 25, 1901, but prior to March 4, 1905, and was living on the latter date. The finding upon which appellants rely is this:

'The evidence and the records of this office show that said Cheparney Larney is

the child of Jacob Larney and Bettie Larney, whose names appear as "Big Jack" and "Bettie" on a schedule of citizens by blood of the Creek Nation, approved by the Secretary of the Interior March 28, 1902, opposite Nos. 8291 and 8292, respectively.'

"The only material fact here found was that the enrollment of the child's parents, already recited as Jacob Larney and Bettie Larney, as citizens of the Creek Tribe, had been approved by the Secretary of the Interior prior to March 3, 1905. This fact was a matter of record with the Commissioner, and this record evidence introduced at the present trial showed that their enrollment was approved by the Secretary of the Interior on March 28, 1902, as the finding alleges. The recital to the effect that Jacob Larney and wife were identical with 'Big Jack' and wife, and the recital of the roll numbers, were unnecessary and of no binding effect. Suppose that there had been an actual pending controversy whether the child whose application was being considered was the child of Jacob Larney and wife, or of 'Big Jack' and wife. It is clear, since the enrollment of all of these four people had been approved by the Secretary of the Interior prior to March 3, 1905, as shown by the records in evidence, that the Commission would not have been called upon to decide the dispute as to parentage, and, if it had decided it, the decision would not be binding. The only finding that was material for the Commission to make was that the enrollment of the parents, whoever they were, being citizens of the Creek Tribe, had been approved by the Secretary of the Interior prior to March 3, 1905.

"Omitting from this finding the surplusage as to the aliases of Jacob Larney and wife and the numbers of the enrollment, the essential part remains that they were citizens of the Creek Tribe, and that their enrollment had been approved by the Secretary of the Interior, on March 28, 1902. The cases relied upon by appellants and cited above as to the conclusive effect of findings by the Commissioner, are in harmony with these views. They all hold that findings which are necessary to the adjudication are conclusive. But they also clearly hold that findings which are not necessary to the adjudication are not conclusive.

"Appellants themselves abandon the theory that this finding upon which they rely, is conclusive in its entirety. Their whole case depends upon a rejection of that part of the finding relating to the identity of Jacob Larney and wife with 'Big Jack' and wife. The decision of the Commissioner in our opinion was ambiguous as to the identity of the applicant, and extrinsic evidence was admissible to prove it.

"2. The evidence, extrinsic of the decision of the Commissioner, as to the identity of the plaintiff with the applicant who was actually enrolled, is to our minds clear and convincing. The testimony of Posey that the child whom he reported for enrollment was the child of Jacob Larney and wife, found by him at their house; the evidence that this report and Posey's testimony were the basis of the application for the enrollment actually made; that the parents of the child whom Posey reported were unwilling to give the child's name, owing to the antagonistic attitude of the maternal grandfather, and that the Commissioner, being unable to find out

the real name of the child, named 'Cheparney Larney'; that the three sons of 'Big Jack' were all accounted for on the records of the Commission, two of them having been enrolled and one rejected; that Posey did not visit the house of 'Big Jack' and report his children, but such report was made by a different agent; that Jacob Larney, whose boy Posey reported was of Arkeka Tulledega Town, and his wife of Hillabee Town, and that the record evidence shows such to be the facts as to plaintiff's father and mother, but not to be the facts as to 'Big Jack' and his wife; that the government officials in July, 1907, notified Jacob Larney of the enrollment of his son, and requested him to make a selection of lands; that the government officials again, in May, 1908, notified Jacob Larney of an arbitrary allotment of lands to his son, which is the allotment here in controversy; that the deeds to the allotment were delivered to Jacob Larney for his son, the present plaintiff, and that possession of the lands was taken on behalf of the plaintiff, and that no claim to the land was made by 'Big Jack' for years—all establishes clearly that the applicant before the Commissioner was the present plaintiff, the child of Jacob Larney and wife, that he was the person enrolled, and that this was so understood by the Commission."

II.

Did the Trial Court Have Jurisdiction of This Cause?

The bill of complaint in this case might have stated the federal question more elaborately—it could have plead that a construction of the Act of

March 3, 1905, was involved for determination of this case. But it was clear to a person familiar with Indian land law that said act was involved from the allegations in the bill of complaint. The defendant below joined issue upon the federal question involved, without suggesting that the complaint did not raise a federal question, and his brief filed in this court argues nothing else than a federal question, except the question of jurisdiction. From the pleadings and the proofs contained in the record of this case, it clearly appears that the plaintiff's claim is based upon one construction of the Act of March 3, 1905 (33 Stat. 1048), while the defendants' claim is based upon a different construction of the same act. This makes a federal question.

Where the jurisdiction is not challenged by a pleading, but the question is raised for the first time in the appellate court, jurisdiction sufficiently appears if it is shown in any part of the record including the proofs.

—*Robertson v. Cease*, 97 U. S. 646, 648, 24 L. ed. 1057;

Sun Printing Ass'n v. Edwards, 194 U. S. 377, 382, 24 Sup. Ct. 696, 48 L. ed. 1027;

Horne v. Hammond Co., 155 U. S. 393, 15 Sup. Ct. 167, 39 L. ed. 197;

Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. ed. 844;

Mahoning Valley Railway Co. v. O'Hara, 196 Fed. 945, 116 C. C. A. 495.

For the reasons herein stated we think that the judgment rendered in this case should be affirmed.

Respectfully submitted,

ELIAS J. VANCOURT,

CLARK NICHOLS,

HORACE D. REUBELT,

Counsel for Appellees.

NORTON ET AL. v. LARNEY, A MINOR, ET AL.

**APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT**

No. 146. Submitted December 8, 1924.—Decided January 5, 1925.

1. An averment in a bill to quiet title to a Creek Indian allotment that the plaintiff went into possession by authority of treaties between the Creek Nation and the United States and the laws of Congress dealing with the lands and individuals of the Creek

Nation, is insufficient to show that the case arose under those laws and treaties. P. 513.

2. When a right to land set up by the plaintiff in a suit to quiet title would be defeated by a construction of an act of Congress contended for by the defendant, but supported by the opposite construction, the case arises under a law of the United States, within the meaning of Jud. Code, § 24. P. 515.
 3. If the jurisdictional facts are not alleged in the bill, it is the duty of the District Court to dismiss the suit, unless those facts be supplied by amendment. *Id.*
 4. The District Court, while it has control of the record, even after reversal and remand, can allow the initial pleading to be amended to show jurisdictional facts appearing of record. P. 516.
 5. Such an amendment will also be allowed in this Court (Rev. Stats., § 954) when the jurisdictional facts are in the record, and indisputable, and the amendment can occasion no surprise. *Id.*
 6. Of the findings made by the Commissioner to the Five Civilized Tribes in enrolling children, under the Act of March 3, 1905, c. 479, 33 Stat. 1071, those upon matters merely incidental or collateral to the direct issues presented by the statute are not conclusive in subsequent proceedings—e. g., as to whether a child's parents were known by aliases and the precise numbers of their enrollments. P. 517.
 7. A latent ambiguity in such findings, may be resolved by parol evidence. *Id.*
 8. Where two courts have reached the same conclusion on a question of fact, it will be accepted here unless clearly erroneous. P. 518.
- 289 Fed. 395, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court in favor of the appellee, Larney, in his suit to quiet title to land allotted to him as a citizen of the Creek Nation.

Mr. Nathan A. Gibson and *Mr. Joseph L. Hull* for appellants. *Mr. Thomas L. Gibson* and *Mr. Glenn R. Horner* were also on the brief.

Mr. Elias J. Van Court for appellees. *Mr. Clark Nichols* and *Mr. Horace D. Reubelt* were also on the brief.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit to quiet title to a tract of land in Oklahoma, alleged to have been allotted to Larney, a Creek Indian, as a distributive share of the lands of the Creek Nation. The district court rendered a decree for appellees, which upon appeal was affirmed by the circuit court of appeals. 289 Fed. 395. In the trial court the jurisdiction was in no way called in question; but it was challenged, for the first time, in the circuit court of appeals; and is challenged here. It is alleged that all the parties are citizens and residents of Oklahoma; and the question of jurisdiction depends upon whether the suit arises under a law of the United States. The bill avers that Larney went into possession of the allotment by authority of treaties between the Creek Nation and the United States and the laws of Congress dealing with the land and individuals of that Nation. We agree with the circuit court of appeals that while this allegation is insufficient to establish jurisdiction, *Taylor v. Anderson*, 234 U. S. 74; *Hull v. Burr*, 234 U. S. 712, 720, it sufficiently appears elsewhere in the record that the suit arose under an act of Congress and its solution depended on the construction and effect of that act. On this the circuit court of appeals held the district court had jurisdiction and disposed of the case upon the merits. The Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1071, provides: "That the Commission to the Five Civilized Tribes is authorized for sixty days after the date of the approval of this Act to receive and consider applications for enrollments of children born subsequent to May 25, 1901, and prior to March 4, 1905, and living on said latter date, to citizens of the Creek tribe of Indians whose enrollment has been approved by the Secretary of the Interior prior to the date of the approval of this Act; and to enroll and make allotments to such children." In pursuance of that act the

commissioner (successor of the commission, *Martin v. United States*, 168 Fed. 200) enrolled a child under the name of Cheparney Larney. The decision of the commissioner recites that, in 1905, a Creek field party went to the home of this child, then about a year old, to obtain information in respect of his right of enrollment; that the parents refused to give any information; and that the child was thereupon called by the name of Cheparney Larney, "Cheparney" being a Creek word signifying "little boy." The important words of the decision are: "The evidence and the records of this office show that said Cheparney Larney is the child of Jacob Larney and Bettie Larney, whose names appear as 'Big Jack' and 'Bettie' on a schedule of citizens by blood of the Creek Nation, approved by the Secretary of the Interior March 28, 1902, opposite Nos. 8291 and 8292 respectively." Thereupon the commissioner held that Cheparney Larney was entitled to be enrolled under the foregoing act of Congress; and the application for his enrollment was accordingly granted. The appellee, Larney, is the son of Jacob and Bettie Larney, and the evidence shows that the allotment deed was delivered to Jacob, the father, and that appellee went into possession of the land under the deed sometime prior to the commencement of this suit. It appears from the evidence that Jacob and Bettie Larney are not the same persons as "Big Jack" and "Bettie," but that they are citizens of the Creek tribe and actually enrolled, with the approval of the Secretary of the Interior at the right time, under the numbers 7968 and 8631.

On behalf of appellants it was contended that "Big Jack" and "Bettie," his wife, had three children, the youngest of whom was known as Cheparney Larney; and that it is to this child the decision of the commissioner relates. In support of this contention appellants insisted, and still insist, that the requirement of the statute,—that children born to citizens of the Creek tribe "whose enroll-

ment has been approved by the Secretary of the Interior prior to the date of the approval of this Act" should be enrolled and receive allotments,—necessitated an identification of the parents of the child and a finding that they were enrolled with the approval of the Secretary together with the names and numbers under which they appeared on the tribal roll. Thus construing the statute, it was and is insisted that the recital in the decision of the commissioner, that the names of the parents of Cheparney Larney appear as "Big Jack" and "Bettie" opposite Nos. 8291 and 8292, conclusively establishes that the individual enrolled was the child of the persons identified by these aliases and numbers. On the other hand, the contention of appellees is that no finding of this character is required by the statute and that the recital is, therefore, not conclusive but open to explanation and contradiction. It thus appears that the right set up by appellees would be defeated by the construction of the act as appellants contend; but would be supported by the opposite construction. The case, therefore, in fact is one arising under a law of the United States within the meaning of § 24, subdivision 1, of the Judicial Code. See *Osborn v. Bank of United States*, 9 Wheat. 738, 822; *Macon Grocery Co. v. Atlantic Coast Line R. R. Co.*, 215 U. S. 501, 506.

Upon this state of facts appearing of record, we are of opinion that the circuit court of appeals was right in sustaining the jurisdiction of the trial court. *Denny v. Pironi*, 141 U. S. 121, 124-125; *Robertson v. Cease*, 97 U. S. 646, 648; *Sun Printing & Publishing Assn. v. Edwards*, 194 U. S. 377, 382. It is quite true that the jurisdiction of a federal court must affirmatively and distinctly appear and cannot be helped by presumptions or by argumentative inferences drawn from the pleadings. If it does not thus appear by the allegations of the bill or complaint, the trial court, upon having its attention called to the defect or upon discovering it, must dismiss

the case, unless the jurisdictional facts be supplied by amendment. But here no action was taken by that court and none was asked by appellant. Both court and parties proceeded as though the necessary allegations had been made, as they undoubtedly could have been made either originally or, under leave of the trial court, by amendment at any stage of the proceedings, while the record remained under the control of that court. *Mexican Central Ry. Co. v. Duthie*, 189 U. S. 76, 77-78. And if this court should now reverse the decree and remand the cause, that amendment could still be allowed by the trial court. *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 240; *Menard v. Goggan*, 121 U. S. 253; *Robertson v. Cease*, *supra*, pp. 650-651; *Horne v. George H. Hammond Co.*, 155 U. S. 393; *Stuart v. Easton*, 156 U. S. 46. True, the practice of this court has been to remit the question of amendment to the lower court unless the parties consented to an amendment here. *Udall v. Steamship Ohio*, 17 How. 17, 18-19; *Kennedy v. Georgia State Bank*, 8 How. 586, 610-611. But under § 954, Rev. Stats., the power of this court, in its discretion, to allow such amendments (see *Kennedy v. Georgia State Bank*, *supra*; *Anonymous* 1 Fed. Cas. No. 444), and its duty to do so in appropriate cases, cannot be doubted. And where, as here, the jurisdictional facts appear upon the face of the record; where the very contention of the party interposing the challenge to the jurisdiction is such as to plainly establish it, beyond the possibility of successful dispute, thus eliminating any element of surprise; and where the amendment must necessarily be allowed by the trial court, it would be mere ceremony to reverse the decree and remit the purely formal making of the amendment to the lower court. We shall, therefore, consider the bill as amended to conform to the facts of record and sustain the jurisdiction of the district court. See *Shaw v. Railroad Co.*, 101 U. S. 557, 566-567; *Thayer v. Manley*, 73 N. Y. 305, 309-310.

We come then to the merits. The issues to be determined by the commissioner are found in the act of Congress already quoted. A reading of that act demonstrates that the material facts to be found and, consequently, those alone which the findings of the commissioner conclusively establish, are that the child was born between May 25, 1901, and March 4, 1905; that he was living on the latter date; and that his parents were citizens of the Creek tribe of Indians whose enrollment had been approved by the Secretary of the Interior prior to the date of the approval of the act. Inquiry as to whether the parents of the child were known by other names and, if so, what those names were, as well as the precise numbers under which they were enrolled, was incidental or collateral to the direct issue presented by the statute, which was, were they enrolled with the approval of the Secretary of the Interior at the proper time? Recitals in respect of such matters or of other merely identifying circumstances such as the exact age of the child, its sex, etc., *Hegler v. Faulkner*, 153 U. S. 109, 117-118; *Malone v. Alderdice*, 212 Fed. 668; *United States v. Lena*, 261 Fed. 144, 149, 150; *Porter v. United States*, 260 Fed. 1, 4, are not conclusive in subsequent proceedings about the same subject matter. The principle of *res judicata* does not apply to points which come under consideration only collaterally or incidentally. *Duchess of Kingston's Case*, 2 Smith's Leading Cases (7th Am. ed., Hare & Wallace) 609, 610 (*573); *Hopkins v. Lee*, 6 Wheat. 109, 114; *Campbell v. Consalus*, 25 N. Y. 613, 616-617; *People v. Johnson*, 38 N. Y. 63, 64-66. But apart from these considerations, parol evidence was admissible to resolve the latent ambiguity, disclosed by the record, arising from the use of names and aliases as though belonging to the same persons but, in fact, belonging to different persons.

The evidence in respect of the identity of the child to whom the allotment was made is conflicting. Upon this

Counsel for Appellant.

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evidence both courts below found the fact to be that appellee, Larney, was the person to whom the commission's decision related and to whom the allotment was made. The well-settled rule of this court is that where two courts have reached the same conclusion upon a question of fact it will be accepted here unless clearly erroneous. *Bodkin v. Edwards*, 255 U. S. 221, 223; *Baker v. Schofield*, 243 U. S. 114, 118. An examination of the evidence not only fails to disclose such clear error but, on the contrary, establishes the conclusion of the lower courts by a clear preponderance.

Decree affirmed.